Supreme Court, U.S.
FILED

021377 MAR 14 2003

OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

BUCK DOE,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

JACK W. CAMPBELL IV
(*Counsel of Record*)
AMAR D. SARWAL
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
(202) 879-3939

JOSEPH E. WOLFE
TERRY G. KILGORE
WOLFE, WILLIAMS
& RUTHERFORD, P.C.
470 Park Avenue
Norton, VA 24273-0625
(276) 679-0777

Counsel for Petitioner

QUESTION PRESENTED

Whether an individual who has suffered an "adverse effect" as a result of a federal agency's "intentional or willful" violation of the Privacy Act, 5 U.S.C. § 552a *et seq.*, must further prove that he has suffered "actual damages" to be entitled to the minimum statutory damages award of $1,000 available under Section 552a(g)(4) of the Act.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Buck Doe, Robert Doe, Tays Doe, Otis Doe, Thomas Doe, Joe Doe, Charles Doe, and the United States Department of Labor. Each of the Doe parties are individuals, and none has any related corporate entities.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

1. Statutory and Regulatory Background 2
2. The Litigation Below 5

REASONS FOR GRANTING THE WRIT 10

I. THERE IS A SUBSTANTIAL CIRCUIT SPLIT ON THE QUESTION OF WHETHER A STATUTORY DAMAGES AWARD UNDER SECTION 552a(g)(4) OF THE PRIVACY ACT REQUIRES PROOF OF "ACTUAL DAMAGES" 11

II. THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW THAT MERITS THIS COURT'S IMMEDIATE REVIEW 13

III. THE DECISION BELOW MISCONSTRUES SECTION 552a(g)(4) OF THE PRIVACY ACT ... 16

CONCLUSION 21

TABLE OF AUTHORITIES

Cases **Page**

Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980) 21
Baker v. Dep't of Navy, 814 F.2d 1381 (9th Cir. 1987) 21
Bechhoefer v. U.S. Dep't of Justice Drug Enforcement Admin., 209 F.3d 57 (2d Cir. 2000) 21
Chicago v. Envtl. Defense Fund, 511 U.S. 328 (1994) 18
Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982) 21
Dawson v. Leewood Nursing Home, Inc., 14 F. Supp. 2d 828 (E.D. Va. 1998) 16
Duncan v. Walker, 533 U.S. 167 (2001) 17
Fitzpatrick v. IRS, 665 F.2d 327 (11th Cir. 1982) 11
Hudson v. Reno, 130 F.3d 1193 (6th Cir. 1997), *overruled in part, Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) 12
Indian Towing Co. v. United States, 350 U.S. 61 (1955) 18
Johnson v. Dep't of Treasury, 700 F.2d 971 (5th Cir. 1983) 11
Lane v. Pena, 518 U.S. 187 (1996) 18
Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998) 17
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) 21
Northcross v. Bd. of Educ., 412 U.S. 427 (1973) 16
Olmstead v. Zimring, 527 U.S. 581 (1999) 20
Parks v. IRS, 618 F.2d 677 (10th Cir. 1980) 12
Perry v. FBI, 759 F.2d 1271 (7th Cir. 1985) 21
Quinn v. Stone, 978 F.2d 126 (3d Cir. 1992) 17, 21
Smith v. United States, 507 U.S. 197 (1993) 18
Time, Inc. v. Hill, 385 U.S. 374 (1967) 14

TABLE OF AUTHORITIES (cont'd)

Page

Tomasello v. Rubin, 167 F.3d 612 (D.C. Cir. 1999) 12

TABLE OF AUTHORITIES (cont'd)

Page

United Labs., Inc. v. Rukin, No. 98-C-602, 1999 WL 608712 (N.D. Ill. Aug. 4, 1999) 16
United States v. Cleveland Indians Baseball Co., 532 U.S. 200 (2001) 17
United States v. Mitchell, 463 U.S. 206 (1983) 15
United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 18
United States v. Williams, 514 U.S. 527 (1995) 18
Waters v. Thornburgh, 888 F.2d 870 (D.C. Cir. 1989) 12
Wilborn v. Dep't of Health & Human Servs., 49 F.3d 597 (9th Cir. 1995) 12

Statutes, Rules & Regulations

5 U.S.C. § 552a(b) 2
5 U.S.C. § 552a(d) 2
5 U.S.C. § 552a(e) 2
5 U.S.C. § 552a(g) 1, 3, 18
5 U.S.C. § 552a(g)(1) 1
5 U.S.C. § 552a(g)(1)(A) 4, 17
5 U.S.C. § 552a(g)(1)(B) 4, 17
5 U.S.C. § 552a(g)(1)(C) 4
5 U.S.C. § 552a(g)(1)(D) ..... *passim*
5 U.S.C. § 552a(g)(2) 4, 18
5 U.S.C. § 552a(g)(3) 4, 18
5 U.S.C. § 552a(g)(4) ..... *passim*
5 U.S.C. § 552a(g)(4)(A) ..... *passim*
5 U.S.C. § 552a(g)(4)(B) 2, 18
5 U.S.C. § 552a(i) 19
18 U.S.C. § 2707 9

TABLE OF AUTHORITIES (cont'd)

Page

18 U.S.C. § 2707(a) 15
18 U.S.C. § 2707(c) 15
26 U.S.C. § 7217(c) (Supp. 1981) 9
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 1
40 Fed. Reg. 28,948 (July 9, 1975) 5, 20
Black Lung Benefits Act of 1981, 30 U.S.C. § 901 *et seq.* 5
Electronic Communications Privacy Act of 1986, Pub. L. 99-508, 100 Stat. 1848 15
Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 ..... 13, 14
Privacy Act of 1974, Pub. L. 93-579, 88 Stat. 1896 ..... *passim*

Legislative History

Comm. on Gov't Operations U.S. Senate and Comm. on Gov't Operations House of Representatives, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579) Source Book on Privacy* (1976) 3, 5, 13, 19
H.R. Rep. No. 93-1416 (1974) 3, 4, 19
H.R. Rep. No. 107-609 (2002) 14
S. Rep. No. 93-1183 (1974) 3, 13, 19
S. Rep. No. 99-541 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555 15

TABLE OF AUTHORITIES (cont'd)

Page

Miscellaneous

25 C.J.S. *Damages* (2002) 20
Defense Advanced Research Projects Agency, *Strategic Plan* (Feb. 2003) 14
D. Dobbs, *Law of Remedies* (2d ed. 1993) 14, 20
S. Hoar, *Identity Theft: The Crime of the New Millennium*, 49(2) United States Attorneys' USA Bulletin (Mar. 2001) 13
The Intensifying Scrutiny at Airports, BusinessWeek Online (June 5, 2002), *available at* http://www.businessweek.com/technology/content/jun2002/ tc2002065_2255.htm 14
C. McCormick, *Damages* (1935) 19
2 J. O'Reilly, *Federal Information Disclosure* (3d ed. 2000) 19
D. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 Minn. L. Rev. 1137 (2002) 13

PETITION FOR A WRIT OF CERTIORARI

Buck Doe petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-60a) is reported at 306 F.3d 170. The opinion of the district court (App. 61a-68a) and the report and recommendation of the magistrate judge (App. 69a-104a) are unreported.

JURISDICTION

The district court had jurisdiction under 5 U.S.C. § 552a(g)(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals entered its judgment on September 20, 2002, and denied petitioner's motion for rehearing and suggestion of rehearing *en banc* on November 15, 2002. App. 1a-2a. On January 23, 2003, Chief Justice Rehnquist, as Circuit Justice for the Fourth Circuit, granted petitioner's motion for extension of time to file a petition for a writ of certiorari up to and including March 15, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Privacy Act, 5 U.S.C. § 552a *et seq.*, are set forth in the appendix. App. 105a-106a.

STATEMENT

Section 552a(g) of the Privacy Act of 1974 provides that the "United States shall be liable" to an "individual" who proves that an agency's "intentional or willful" disclosure of private information contained in a "system of records" caused him an "adverse effect." 5 U.S.C. §§ 552a(g)(1)(D), (g)(4). The measure of liability is "the sum of" "actual damages sustained by the individual . . . but in no

case shall a person entitled to recovery receive less than the sum of $1,000" and "the costs of the action together with reasonable attorney fees as determined by the court." *Id.* § 552a(g)(4)(A) & (B). This case presents the question of whether an award of $1,000 statutory damages under the Act is conditioned upon the individual's proof of some "actual damages." At stake is the Privacy Act's viability as a mechanism to protect individuals against federal agencies' disclosure of sensitive, private information.

1. Statutory and Regulatory Background

The Privacy Act of 1974 protects individuals' "personal and fundamental right" of privacy by "regulat[ing] the collection, maintenance, use, and dissemination of information by [federal] agencies." Pub. L. 93-579 §§ 2(a)(4), 2(a)(5), 88 Stat. 1896. Except pursuant to enumerated exceptions, an agency may not "disclose any record which is contained in a system of records by any means of communications to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b). The Act affords individuals a right to review and, where appropriate, demand amendment of agency records that are not accurate, relevant, timely, or complete. *Id.* § 552a(d)(1)-(3). The Act also stringently regulates the manner by which an agency may collect and maintain information about individuals. *Id.* § 552a(e).

Congress enacted the Privacy Act out of concern that "the privacy of an individual is directly affected by the collection, maintenance, use, and dissemination of personal information by Federal Agencies." Pub. L. 93-579 § 2(a)(1). Advances in computerization had "greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information." *Id.* § 2(a)(2). The

potential harms include impairment of "opportunities for an individual to secure employment, insurance, and credit, and . . . right to due process." *Id.* § 2(a)(3). Congress specifically condemned federal agencies' frequent use and disclosure of social security numbers as "one of the most serious manifestations of privacy concerns in the Nation." S. Rep. No. 93-1183, at 28 (1974), *reprinted in* Comm. on Gov't Operations U.S. Senate and Comm. on Gov't Operations House of Representatives, *Legislative History of the Privacy Act of 1974 S. 3418 (Public Law 93-579) Source Book on Privacy*, 151, 181 (1976) [hereinafter "*Source Book*"]; *see* Pub. L. 93-579 § 7.

Congress intended that a private right of action under the Privacy Act be "designed to encourage the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236; *see also* H.R. Rep. No. 93-1416 at 15 (1974), *reprinted in Source Book* at 294, 308 ("best means" to enforce the Act is "constant vigilance of individual citizens backed by legal redress"). Accordingly, Congress subjected agencies "to civil suit for any damages which occur as a result of willful or intentional action which violates any individual's rights under [the] Act." Pub. L. 93-579 § 2(b)(6).

Section 552a(g) sets forth the Act's civil remedies provisions. Section 552a(g)(1)(D) provides a private right of action for, among other things, wrongful disclosures of information:

> Whenever an agency . . . fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the

district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.[1]

Section 552a(g)(4) further defines and measures the United States' liability in such suits:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of —
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorneys fees as determined by the court.

5 U.S.C. § 552a(g)(4)(A).

The Act's legislative history describes Section 552a(g)(4)(A)'s $1,000 statutory damages clause as "liquidated damages . . . [to be] assessed against the agency for a violation of the Act." *Source Book* at 768 (report of "technical and substantive committee amendments"); *see also* H.R. Rep. No. 93-1416, at 38, *reprinted in Source Book* at 330 (pre-amendment view of various House members that the Act should "at the very least" contain a "liquidated damages" provision).

---

[1] Sections 552a(g)(1)(A) and (g)(1)(B) allow suits for injunctive relief where an agency fails to amend an inaccurate record or fails to provide access to records, respectively. *See* 5 U.S.C. §§ 552a(g)(1)(A), (g)(1)(B), (g)(2), and (g)(3). Section 552a(g)(1)(C) allows damages suits for failure to properly maintain an accurate record that forms the basis of an "adverse" determination. *See id.* §§ 552a(g)(1)(C), (g)(4).

The Office of Management and Budget ("OMB"), tasked to "develop guidelines and regulations for the use of agencies in implementing the provisions of [the Act]", Pub. L. 93-579 § 6, promulgated Privacy Act Guidelines only months after the Act was passed. The Guidelines construe Section 552a(g)(4) to mean:

> When the court finds that an agency has acted willfully or intentionally in violation of the Act in such a manner as to have an adverse effect upon the individual, the United States will be required to pay
>
> – actual damages or $1,000, whichever is greater
>
> – court costs and attorney fees.

40 Fed. Reg. 28,948, 28,970 (July 9, 1975).

2. The Litigation Below

The Department of Labor ("Department") administers claims brought pursuant to the Black Lung Benefits Act of 1981, 30 U.S.C. § 901 *et seq*. App. 5a. The Department's application form asks claimants to provide their social security numbers, which the Department uses as claim identifiers. *Id*. Administrative law judges (ALJs) routinely distribute hearing notices identifying multiple black-lung claims by social security number. *Id.* ALJs also routinely caption benefits decisions with claimants' social security numbers and release them for publication. As a result, claimants' social security numbers were widely disclosed. App. 5a-6a. The existence and operation of these policies are undisputed. App. 63a, 70a-71a, 82a.

In February 1997, Buck Doe and several other black-lung benefit claimants brought Privacy Act suits against the Department in the United States District Court for the Western District of Virginia. The suits were brought pursuant to Section 552a(g)(1)(D), and each sought $1,000 statutory damages under

Section 552a(g)(4)(A). App. 5a-6a, 82a-83a. Immediately after Doe filed suit, the Department consented to an order barring disclosure of claimants' social security numbers on hearing notices or other documents. *Id.* Doe and the other plaintiffs then moved to certify a class of claimants, and the parties cross-moved for summary judgment. *Id.* The district court referred the matter to a magistrate judge for report and recommendation. *Id.*

The magistrate judge received evidence and conducted hearings. In a sworn affidavit and in testimony, Doe attested that the Department's disclosure of his social security number caused him significant emotional distress, specifically fear that someone would fraudulently use his name and social security number. App. 75a-76a.

The magistrate judge found that there was "little, if any dispute in the facts at issue in this case," and the "issues to be determined, therefore, are whether the undisputed facts prove that the Department violated the Privacy Act and whether the Plaintiffs are entitled to damages." App. 82a. The magistrate judge concluded that: (i) social security numbers are "records" held by the Department in a "system of records" under the Privacy Act, App. 86a; (ii) Doe had not consented to the Department's disclosure of his social security number, App. 87a-88a; (iii) no exception to the Privacy Act's restrictions excused the Department's disclosure, App. 88a-92a; (iv) as a result of the disclosure, Doe had suffered the "adverse effect" of emotional distress, App. 93a-94a; (v) "undisputed evidence" proved the Department's actions "intentional and willful," App. 96a-97a; and (vi) Doe's evidence of emotional harm could trigger at least "the statutory damages provided for in the Act" and, thus, the Department was not entitled to summary judgment. App. 99a-100a.[2]

---

[2] The magistrate judge recommended granting the Department summary judgment on the other plaintiffs' claims because none had produced

The district court accepted the magistrate's report in part and rejected it in part. App. 61a-62a. It held that Doe had proven the "elements essential to prevail on a claim for damages under the Privacy Act." App. 66a. It further held that Doe's "incontrovertible evidence" of "emotional distress as a result of the Department disclosing his social security number to parties not specifically involved in his black lung claim" was sufficient to "allow[] granting summary judgment in his favor" for the "statutory minimum amount of $1,000 . . . provided by 5 U.S.C. § 552a(g)(4)(A) . . . ." App. 66a-67a.

A split panel of the Fourth Circuit reversed. The court framed the issue on appeal as "whether a person must suffer 'actual damages' in order to be considered 'a person entitled to recovery' within the meaning of section 552a(g)(4)(A), and therefore entitled to the statutory minimum of $1,000 under that section." App. 9a. Relying on "several reasons, perhaps no one of which alone would be dispositive," the court held that "a person must sustain actual damages to be entitled to the statutory minimum damages award." *Id.* It acknowledged, however, that this interpretation was "not strictly compelled by the statute's language" and that the decision deepened a split of authority among the circuits. App. 12a-13a & n.3.

The decision below rested on rationales deemed convincing in the "aggregate." App. 9a. *First*, "as a matter of statutory

---

sufficient evidence of adverse effect. App. 100a. The magistrate judge also recommended denial of class certification because named plaintiffs' claims were not "typical" of class claims as defined in the complaint. App. 79a-81a. The district court accepted these recommendations, App. 61a-62a, and the Fourth Circuit affirmed. App. 21a-23a. The resolution of these separate issues has no bearing on the question presented in this petition, and they are not before this Court. Accordingly, in the remainder of this petition, Doe discusses only those rulings and issues relevant to his individual Privacy Act claim.

interpretation" Section 552a(g)(4)(A)'s juxtaposition of the phrases "person entitled to recovery" and "actual damages" "indirectly" defined "'recovery' . . . by its express limitation of the Government's liability to actual damages sustained." *Id.* (emphasis omitted). *Second*, this proximity "establishe[d] as a grammatical matter" that "a person entitled to recovery" references "one who is able to show actual damages." App. 10a (emphasis omitted). *Third*, placement of the conjunction "but" between Section 552a(g)(4)(A)'s clauses "reinforce[d] the conclusion that the second clause . . . adds a qualification with respect to the class of plaintiffs defined by the first . . . ." *Id. Fourth*, "Congress, with ease, could have phrased the liability provision to provide unequivocally for a statutory minimum recovery, even for those who are unable to prove actual damages." App. 11a. *Finally*, the court conceded its interpretation "is not strictly compelled by the statute's language," but reasoned that because the Privacy Act is a "limited waiver of sovereign immunity," Section 552a(g)(4)(A) must be "strictly construed." App. 13a-14a. The court then held that Doe's proof of emotional harm was not sufficient to establish "actual damages" under the Act, reversed the district court, and remanded with instructions to enter summary judgment for the Department. App. 14a-18a.

Judge Michael dissented. He agreed with the majority that a Privacy Act plaintiff "must prove he has suffered an adverse effect as a result of an agency's intentional or willful violation of the Act," that "emotional distress can qualify as an adverse effect and that Buck Doe's statements about his emotional distress are sufficient to allow a finding that he suffered an adverse effect as a result of the Department of Labor's wrongful disclosure of his social security number." App. 30a. Judge Michael would have held, however, that a Privacy Act plaintiff who proves an "adverse effect" caused by an agency's "willful or intentional" disclosure of private information can recover $1,000 statutory damages under

Section 552a(g)(4)(A) without further proving some measure of "actual damages." App. 25a.

Judge Michael noted that the Act expressly states, in language preceding Section 552a(g)(4)(A)'s "person entitled to recovery" clause, that the United States "shall be liable" to an individual who demonstrates an "adverse effect" caused by an "intentional or willful" violation of the Act. App. 31a-32a & n.4. Thus, "the phrase 'person entitled to recovery' is more naturally read to mean anyone to whom 'the United States shall be liable . . . .'" App. 30a. Moreover, "[a]s a matter of ordinary language usage, an entitlement to 'recovery' is surely broader than an entitlement to actual damages." App. 31a. This view finds support in the "text of the statute allow[ing] . . . a plaintiff who has proven an intentional or willful violation of the Privacy Act to recover costs and reasonable attorney fees even if the plaintiff has suffered no actual damages at all." App. 32a.

Judge Michael buttressed his interpretation with three additional arguments. *First*, "most circuit courts have read the Privacy Act to allow recovery of statutory damages without proof of actual damages." App. 33a. *Second*, the interpretation is "consistent with" the Privacy Act Guidelines, which are "due the deference accorded to the interpretation of an agency charged with oversight of implementation." App. 35a (internal quotation marks omitted). *Third*, the interpretation conforms with that given other statutory damages provisions similar in language, structure, and purpose to Section 552a(g)(4). App. 35a-39a (citing 26 U.S.C. § 7217(c) (Supp. 1981) and 18 U.S.C. § 2707).

Judge Michael criticized the majority's application of a sovereign immunity-based narrowing construction. He "doubt[ed]" that the canon applies when the question is "what a plaintiff must prove to obtain relief that has been unequivocally authorized" and not "whether a lawsuit may be brought at all or

about the availability of certain forms of relief." App. 46a & n.10. In any event, Judge Michael reasoned, the scales "decisively tip" in favor of his interpretation. App. 46a-47a. Congress clearly desired citizen enforcement of the Privacy Act, and damages arising from invasion of privacy wrongs "can be hard to quantify . . . because the typical injury caused . . . is mental distress." App. 50a. Without a statutory damages remedy available in the absence of "actual damages," few individuals would have incentive to sue, and the Act would lose its remedial and deterrent effects. App. 52a, 59a.

The Fourth Circuit denied Doe's petition for rehearing and suggestion of rehearing *en banc*. App. 1a-2a.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit conceded that, in holding that the Privacy Act awards statutory damages for an agency's wrongful disclosure of personal data only if an individual proves some measure of actual damages, it deepened a substantial split of authority among the circuits. *See* App. 12a-13a & n.3. In doing so, the Fourth Circuit rejected the plain reading of Section 552a(g)(4) in favor of a cramped construction that ignores or renders superfluous other language in the Act, reaches a result directly contrary to the Privacy Act's purposes as expressed in the statute's text and legislative history, and conflicts with OMB's administrative interpretation — even as it acknowledged that nothing in the Act's text "compelled" the result reached. App. 12a. Moreover, the decision below erodes the civil enforcement scheme built into the Privacy Act, rendering it incapable of effectively remedying privacy invasions or deterring agency violations. For these reasons, the Court should grant certiorari and reverse the decision below.

I. THERE IS A SUBSTANTIAL CIRCUIT SPLIT ON THE QUESTION OF WHETHER A STATUTORY DAMAGES AWARD UNDER SECTION 552a(g)(4) OF THE PRIVACY ACT REQUIRES PROOF OF "ACTUAL DAMAGES"

As acknowledged in the decision below (App. 12a & n.3; App. 33a-34a (Michael, J., dissenting)), there is a multi-circuit split of authority on the question of whether a $1,000 statutory damages award under Section 552a(g)(4) of the Privacy Act requires proof of "actual damages." The Fourth Circuit's decision accords with a decision of the Sixth Circuit, but conflicts with decisions of the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits.

The Eleventh Circuit's decision in *Fitzpatrick v. IRS*, 665 F.2d 327 (11th Cir. 1982), concerned an award of "statutory minimum $1,000 damages" for the IRS's willful disclosure of a disability benefits application. *Id.* at 328. After analyzing the Privacy Act's text and legislative history, the Eleventh Circuit concluded that Section 552a(g)(4)(A) permits an award of $1,000 statutory damages without proof of any "actual damages." The court reasoned that "[t]o avoid a situation in which persons suffering injury had *no provable damages* and hence *no incentive to sue*, a $1,000 damage floor was added, and costs and attorneys' fees were included as additional elements of recovery." *Id.* at 330 (emphasis added). Thus, because the appellant's asserted mental injuries were not "actual damages" under the Privacy Act, and because the appellant had not proved any other "actual damages," "he could not recover beyond the statutory $1,000 minimum damages, costs, and attorneys fees." *Id.* at 331.

The Fifth, Ninth, Tenth, and D.C. Circuits all have likewise held that $1,000 statutory damages are recoverable under Section 552a(g)(4)(A) without proof of "actual damages." *See Johnson v. Dep't of Treasury*, 700 F.2d 971, 977 & n.12 (5th Cir. 1983) (the "statutory minimum of $1000, of course, is recoverable" even

when a Privacy Act plaintiff has not shown "actual damages"); *Wilborn v. Dep't of Health & Human Servs.*, 49 F.3d 597, 602 (9th Cir. 1995) (citing *Fitzpatrick*; "purpose of the minimum damage provision is to give those with 'no provable damages' the incentive to sue"); *Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980) (Privacy Act complaint is sufficient "even though the plaintiff suffered no pecuniary loss nor physical harm" where he alleges an "adverse effect" in the form of "psychological harm" and "intentional or willful misconduct"); *Waters v. Thornburgh*, 888 F.2d 870, 872 (D.C. Cir. 1989) (plaintiff who suffers an adverse effect as a result of an intentional or willful violation of the Privacy Act is "entitled to the greater of $1,000 or the actual damages sustained"); *Tomasello v. Rubin*, 167 F.3d 612, 614, 618 & n.6 (D.C. Cir. 1999) (upholding statutory damages award even though claimant had neither proven pecuniary losses nor argued that he was entitled to emotional distress damages).

The decision below accords with the Sixth Circuit's decision in *Hudson v. Reno*, 130 F.3d 1193 (6th Cir. 1997), *overruled in part on other grounds*, *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). *Hudson* concerned a claim that the Department of Justice had collected information from third parties in violation of Section 552a(e)(2). *Id.* at 1204. The Sixth Circuit held that the district court had correctly rejected the claim on several grounds, among them "failure to show 'actual damages,' as required by the Act." *Id.* at 1207.

In sum, the courts of appeals are now divided five-to-two on the question of whether a $1,000 statutory damages award under Section 552a(g)(4) of the Privacy Act requires proof of "actual damages." This Court's review is necessary to resolve this substantial judicial conflict.

II. THE DECISION BELOW INVOLVES AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW THAT MERITS THIS COURT'S IMMEDIATE REVIEW

It is crucial that the Privacy Act's civil enforcement provisions be interpreted uniformly. As the frequency and risks of personal data disclosures continue to increase, individuals and the federal government must know with certainty what obligations and potential liabilities the Act's civil enforcement provisions impose.

The very access to personal records through "computers and sophisticated information technology" that Congress anticipated in 1974, *see* Pub. L. 93-579 § 2(a)(2), accounts for the surge in personal data disclosures and their attendant risks. An example is "identity theft," which is the "the fastest-growing financial crime in America and perhaps the fastest growing crime of any kind in our society." S. Hoar, *Identity Theft: The Crime of the New Millennium*, 49(2) United States Attorneys' USA Bulletin (Mar. 2001), *available at* www.usdoj.gov/criminal/cybercrime/usamarch2001_3.htm. Federal database disclosures of social security numbers have been a specific cause of identity theft's rapid spread. D. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 Minn. L. Rev. 1137, 1138-39 (2002); *see* S. Rep. No. 93-1183, at 28, *reprinted in Source Book* at 181 (disclosure of social security numbers is "one of the most serious manifestations of privacy concerns in the Nation").

Furthermore, federal agencies are collecting and sharing ever-increasing amounts of personal data. The recently enacted Homeland Security Act of 2002 ("HSA"), Pub. L. 107-296, 116 Stat. 135, provides an example. As part of the effort to combat terrorism, the HSA confers tremendous power on the Department of Homeland Security ("DHS"), in concert with a number of other federal agencies, to collect, analyze, maintain, and disseminate

information about individuals. *Id.* tit. II & §§ 427, 429, 801, 891-99, 1001-06. Congress recognized that DHS's exercise of these powers would frequently implicate the Privacy Act, which it viewed as an important check on any possible misuse of information. *See* H.R. Rep. No. 107-609, at 90-91 (2002). Indeed, Congress created a DHS "Privacy Officer" responsible for "assuring that personal information contained in Privacy Act systems of records is handled in full compliance with fair information practices as set out in the Privacy Act of 1974," and "preparing a report to Congress on an annual basis of activities of the Department that affect privacy, including complaints of privacy violations, implementation of the Privacy Act of 1974, internal controls, and other matters." Pub. L. 107-296 §§ 222(2)-(5).[3]

From the perspective of individuals, resolution of Section 552a(g)(4)'s proper interpretation will largely determine whether the Act's civil enforcement provisions can effectively vindicate rights granted by the statute and deter agency disclosures of private information. As this Court has recognized, the type of injury most commonly associated with an invasion of privacy is inherently-difficult-to-prove and unquantifiable mental distress. *Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967); *see generally* 2 D. Dobbs, *Law of Remedies* §§ 7.1, 7.3(4) (2d ed. 1993). Accordingly, the availability — or lack of availability — of $1,000

[3] Other examples of recent federal efforts to increase the collection and sharing of personal data abound. *See, e.g.*, Defense Advanced Research Projects Agency, *Strategic Plan* 9-10 (Feb. 2003) (discussing Total Information Awareness project to "correlate and share data from databases maintained by our intelligence, counterintelligence, and law enforcement agencies"); *The Intensifying Scrutiny at Airports*, BusinessWeek Online (June 5, 2002), *available at* http://www.businessweek.com/technology/content/jun2002/tc2002065_2255.htm (discussing CAPPS II system, which compares passenger manifests with data "pull[ed] in . . . from banks, credit-reporting agencies, and other companies that aggregate personal information").

statutory damages under Section 552a(g)(4) in the absence of provable "actual damages" will, in most instances, drive an individual's incentive to bring a civil enforcement action.

From the perspective of the federal government, the persistent split of authority makes it difficult to gauge potential liability with any degree of certainty. "[I]ssues of substantial importance concerning the liability of the United States" ordinarily counsel review by this Court. *United States v. Mitchell*, 463 U.S. 206, 211 (1983). Without a uniform interpretation of Section 552a(g)(4), the federal government will have difficulty assessing its potential Privacy Act liability, and thus will lack information crucial to informed decisions about implementing data collection, analysis, maintenance, and dissemination policies.

Finally, the split of authority over the meaning of Section 552a(g)(4) raises a substantial question about the meaning of nearly identical language in the Electronic Communications Privacy Act of 1984 ("ECPA"), Pub. L. 99-508, 100 Stat. 1848. The ECPA authorizes "any provider of electronic communication service, subscriber or other person aggrieved" to file a civil action against a person or entity that wrongfully discloses stored electronic communications. 18 U.S.C. § 2707(a). In language almost identical to Section 552a(g)(4)(A) of the Privacy Act, it further provides:

> The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of $1,000.

Id. § 2707(c). Congress and some lower federal courts have stated that this provision establishes a minimum recovery of $1,000 for ECPA violations regardless of any proven actual damages or profits made by the violator. *See* S. Rep. No. 99-541, at 43

(1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597; *United Labs., Inc. v. Rukin*, No. 98-C-602, 1999 WL 608712, at *5 (N.D. Ill. Aug. 4, 1999); *Dawson v. Leewood Nursing Home, Inc.*, 14 F. Supp. 2d 828, 832 (E.D. Va. 1998). But the ECPA and Privacy Act "share a common *raison d'etre*" and "the similarity of language . . . is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973). Thus, the conflicting interpretations of Section 552a(g)(4)(A) create uncertainty in the law that stretches beyond the Privacy Act.

III. THE DECISION BELOW MISCONSTRUES SECTION 552a(g)(4) OF THE PRIVACY ACT

In conditioning a statutory damages award under Section 552a(g)(4) upon proof of some "actual damages", the decision below rejects the plain reading of the Privacy Act's text, reaches a result directly contrary to the Privacy Act's purposes as expressed in the statute's text and legislative history, and ignores OMB's contrary administrative interpretation of Section 552a(g)(4).

In language preceding Section 552a(g)(4)(A), the Act states plainly that the "United States shall be liable" to a plaintiff who proves that he suffered an "adverse effect" caused by an agency's "intentional or willful" violation of the Act. 5 U.S.C. §§ 552a(g)(1)(D), (g)(4). As the dissent below properly recognized, App. 30a-32a, the phrase "person entitled to recovery" in Section 552a(g)(4)(A) simply encompasses all those to whom "the United States shall be liable." Sections 552a(g)(4)(A) and (B) provide the *measure* of that liability — at a minimum, the "sum of" $1,000 in statutory damages and attorneys' fees. They do not set forth additional elements required to establish liability *vel non*. Certainly, a plaintiff who establishes "actual damages" may recover them, but Section 552a(g)(4)(A) does not condition the United States' liability on such proof.

The majority below reached a contrary interpretation by ignoring the surrounding text of Section 552a(g)(4) as well as other relevant provisions of the Act and instead focusing entirely on subparagraph (A). App. 10a-12a. This acontextual construction violates the "central tenet" that "a statute is to be considered in all its parts when construing any one of them." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35-36 (1998); *accord, e.g., United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217-18 (2001). The majority's failure to heed this fundamental rule of construction introduces a number of anomalies into the Act.

For one thing, it drains Section 552a(g)(1)(D)'s "adverse effect" requirement of all independent meaning. Courts have deemed this requirement to serve standing and causation functions. *See, e.g., Quinn v. Stone*, 978 F.2d 126, 135 (3d Cir. 1992). But if a "person entitled to recovery" can only be someone who has proven actual damages, then standing, causation, and an "adverse effect" have necessarily been shown. A "statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

For another thing, the decision below suggests that a plaintiff who establishes the United States' liability under Section 552a(g)(1)(D) could obtain attorneys' fees even if he is entitled to no damages — actual *or* statutory. App. 32a & n.3. Such a result would be at odds with the usual rule that only a plaintiff who substantially prevails obtains attorneys' fees. The Act's structure confirms that it creates no such oddity. In actions for injunctive relief under Sections 552a(g)(1)(A) and (B), the Act conditions an award of attorneys' fees on a finding that "the complainant has substantially prevailed." 5 U.S.C. §§ 552a(g)(2)(B) & (3)(B). But Section 552a(g)(4)(B)'s attorneys' fees provision omits this

qualifier, and "it is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another. . . ." *Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted). The omission indicates that Congress deemed Section 552a(g)(1)(D) plaintiffs who demonstrate an adverse effect caused by an agency's intentional or willful action to have "substantially prevailed" because they become entitled to damages of at least $1,000. This damages recovery triggers a concomitant award of attorneys' fees.

The decision below's flawed construction cannot be salvaged by a sovereign immunity canon of construction. App. 13a-14a. *First*, as shown above, Section 552a(g)'s text plainly allows recovery of $1,000 statutory damages without proof of "actual damages." *See, e.g., United States v. Williams*, 514 U.S. 527, 540 (1995) (Scalia, J., concurring) ("The rule does not, however, require explicit waivers to be given a meaning that is implausible."). *Second*, none of the authority cited below supports application of the canon where Congress has expressly waived immunity to suit and to damages liability. *See Lane v. Pena*, 518 U.S. 187, 191 (1996) (determining whether administrative agencies are liable at all for money damages under the Rehabilitation Act); *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (determining whether monetary relief was available at all). To the contrary, this Court has held that where, as here, a statute explicitly waives sovereign immunity to money damages, courts should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955) (construing the Federal Tort Claims Act); *accord Smith v. United States*, 507 U.S. 197, 203 (1993).

The decision below also reaches a result at odds with the Act's purposes as stated in the legislative history and statutory text. The

legislative history confirms that Congress intended the Act to "encourage the widest possible citizen enforcement through the judicial process." S. Rep. No. 93-1183, at 83, *reprinted in Source Book* at 236; *see* H.R. Rep. No. 93-1416, at 15, *reprinted in Source Book* at 308 ("constant vigilance of individual citizens backed by legal redress" is the "best means" of enforcing the Act). But the decision below would force Privacy Act plaintiffs not only to overcome the challenges of showing an "adverse effect" and "intentional or willful" behavior, but also to prove "actual damages," which are seldom the injury resulting from a privacy invasion. *See supra* p. 14. Few individuals would have incentive to enforce the Privacy Act, and fewer still would have a significant chance of prevailing on their claims. The civil remedies provision would become incapable of ensuring that the Act fulfills its purposes to "permit an individual to determine what records pertaining to him are collected, maintained, used, or disseminated" and to "safeguard . . . against an invasion of privacy." Pub. L. 93-579 § 2(b)(1).[4]

Further reinforcing these statutory purposes, the legislative history characterizes Section 552a(g)(4)(A)'s $1,000 statutory damages remedy as "liquidated damages . . . [to be] assessed against the agency for a violation of the Act." *Source Book* at 768; *see also* H.R. Rep. No. 93-1416, at 38, *reprinted in Source Book* at 330 (discussing the need for a "liquidated damages" provision to "deter" agency violations of the Act). As a general matter, it is "not essential" to an award of "liquidated damages" that "the plaintiff sustained actual damages." C. McCormick, *Damages* 622 (1935); *accord* 3 D. Dobbs, *Law of*

---

[4] The Privacy Act creates criminal penalties for certain improper disclosures of information. 5 U.S.C. § 552a(i). The criminal provisions are "rarely employed" and, therefore, "individuals bear the burden of enforcing the Privacy Act." 2 J. O'Reilly, *Federal Information Disclosure* § 22.1 (3d ed. 2000).

Remedies § 12.9(2) (2d ed. 1993); 25 C.J.S. *Damages* § 175 (2002). Thus, the Act allows plaintiffs to recover some liquidated damages for the dignitary harm of a privacy invasion, thereby providing incentive to sue and deterring agency violations. 2 D. Dobbs, *supra*, § 7.3(4). The $1,000 cap on those damages, however, avoids risks of excessive liability. *Id.*; *see* App. 52a n.14.

The decision below also conflicts with — and, in fact, ignores — the longstanding contemporaneous construction of Section 552a(g)(4)(A) by OMB, the agency specifically charged with administering the Act. *See* Pub. L. 93-579 § 6; *see supra* pp. 4-5. In pertinent part, the Privacy Act Guidelines provide that "actual damages or $1,000, whichever is greater," are awarded to an individual who suffers an adverse effect as a result of an intentional or willful violation of the Act. 40 Fed. Reg. at 28,970; *see supra* pp. 4-5. The Guidelines are thus "consistent" with an interpretation of the Privacy Act allowing an award of $1,000 statutory damages absent proof of actual damages. App. 35a (Michael, J., dissenting). Certainly, "the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Olmstead v. Zimring*, 527 U.S. 581, 598 (1999) (internal quotation marks omitted). This is especially so where, as here, OMB's interpretation is longstanding and unchanged by numerous additions to and amendments of the

Guidelines. *See NLRB. v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK W. CAMPBELL IV
(*Counsel of Record*)
AMAR D. SARWAL
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
(202) 879-3939

JOSEPH E. WOLFE
TERRY G. KILGORE
WOLFE, WILLIAMS
& RUTHERFORD, P.C.
470 Park Avenue
Norton, VA 24273-0625
(276) 679-0777

Counsel for Petitioner

March 14, 2003

---

[5] Other courts of appeals have afforded the Guidelines "the deference accorded to the interpretation of an agency charged with 'oversight' of implementation." *Quinn*, 978 F.2d at 133; *accord, e.g., Bechhoefer v. U.S. Dep't of Justice Drug Enforcement Admin.*, 209 F.3d 57, 61-62 (2d Cir. 2000); *Baker v. Dep't of Navy*, 814 F.2d 1381, 1383 (9th Cir. 1987); *Perry v. FBI*, 759 F.2d 1271, 1275-76 & n.7 (7th Cir. 1985); *Clarkson v. IRS*, 678 F.2d 1368, 1374 (11th Cir. 1982); *Albright v. United States*, 631 F.2d 915, 919 n.5 (D.C. Cir. 1980).

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 00-2247
CA-97-43-2

ROBERT DOE, a/k/a Virginia Privacy Litigation; TAYS DOE, a/k/a Virginia Privacy Litigation; BUCK DOE, a/k/a Virginia Privacy Litigation; OTIS DOE, a/k/a Virginia Privacy Litigation; THOMAS DOE, a/k/a Virginia Privacy Litigation; JOE DOE, a/k/a Virginia Privacy Litigation; CHARLES DOE, a/k/a Virginia Privacy Litigation; DICK DOE, a/k/a Virginia Privacy Litigation

Plaintiffs - Appellants

v.

ELAINE I. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Defendant – Appellee.

No. 00-2292
CA-97-0043-2

ROBERT DOE, a/k/a Virginia Privacy Litigation; TAYS DOE, a/k/a Virginia Privacy Litigation; BUCK DOE, a/k/a Virginia Privacy Litigation; OTIS DOE, a/k/a Virginia Privacy Litigation; THOMAS DOE, a/k/a Virginia Privacy Litigation; JOE DOE, a/k/a Virginia Privacy Litigation; CHARLES DOE, a/k/a Virginia Privacy Litigation; DICK DOE, a/k/a Virginia Privacy Litigation

Plaintiffs - Appellees

v.

ELAINE I. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

Defendant – Appellant.

On Petition and Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

November 15, 2002

UNITED STATES COURT OF APPEALS, FOR THE FOURTH CIRCUIT.

Robert DOE, a/k/a Virginia Privacy Litigation; Tays Doe, a/k/a Virginia Privacy Litigation; Buck Doe, a/k/a Virginia Privacy Litigation; Otis Doe, Virginia Privacy Litigation; Thomas Doe, Virginia Privacy Litigation; Joe Doe, Virginia Privacy Litigation; Charles Doe, a/k/a Virginia Privacy Litigation; Dick Doe, a/k/a Virginia Privacy Litigation,

Plaintiffs-Appellants,

v.

Elaine L. CHAO, Secretary of Labor, United States Department of Labor,

Defendant-Appellee.

Robert Doe, a/k/a Virginia Privacy Litigation; Tays Doe, a/k/a Virginia Privacy Litigation; Buck Doe, a/k/a Virginia Privacy Litigation; Otis Doe, Virginia Privacy Litigation; Thomas Doe, Virginia Privacy Litigation; Joe Doe, Virginia Privacy Litigation; Charles Doe, a/k/a Virginia Privacy Litigation,

Plaintiffs-Appellees,

v.

Elaine L. Chao, Secretary of Labor, United States Department of Labor,

Defendant-Appellant.

Nos. 00-2247, 00-2292.
Argued Sept. 26, 2001.
Decided Sept. 20, 2002.

Before LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges.

Affirmed in part, reversed in part, and remanded by published opinion. Judge WILLIAMS wrote the opinion, in which Judge LUTTIG joined. Judge MICHAEL wrote an opinion concurring in part and dissenting in part.

OPINION

WILLIAMS, Circuit Judge.

In this case, several individuals[1] (collectively Appellants) seek recovery against the Secretary of Labor (the Government) under the Privacy Act, 5 U.S.C.A. § 552 *et seq.* (West 1996 & Supp. 2000), and the United States Constitution for the disclosure of their Social Security numbers (SSNs) incident to the adjudication of their black lung compensation claims. They also seek certification of a class of persons whose SSNs were so disclosed. Because we hold that a Privacy Act plaintiff only may recover money damages upon a showing of actual damages, and because Appellant Buck Doe has not made such a showing, we reverse the district court's grant of summary judgment in favor of Buck Doe and hold that the Government was entitled to summary judgment in its favor as to Buck Doe's claim. We affirm the district court's grant of summary judgment in the Government's favor with regard to each of the other Appellants, because no Appellant other than Buck Doe could show any adverse effect stemming from a violation of the Act. We further affirm the district court's denial of leave for Appellants to amend their complaints and submit additional damages evidence. Additionally, because

[1] The Appellants are Tays Doe, Robert Doe, Buck Doe, Charles Doe, Joe Doe, Otis Doe, and Thomas Doe.

it is clear that Appellants' claims are not typical of the claims of the putative class, we affirm the district court's denial of class certification.

I.

The Department of Labor's Office of Workers' Compensation Programs (OWCP) and its Division of Coal Mine Workers' Compensation are charged by Congress with the task of adjudicating black lung compensation claims. These offices retain the files of over one million coal miners who have filed for black lung benefits. To facilitate the processing of claims, OWCP assigned to each black lung claim a unique identifier called an "OWCP number" and used this number to identify the claim throughout the benefits adjudication process. (J.A. at 107, 109-10.) When a coal miner applied for benefits, he was asked to provide his SSN voluntarily and was informed that the number may be used to facilitate determination of benefits eligibility. Prior to the entry of a consent agreement in this case, if a black lung benefits applicant provided his SSN, OWCP used the SSN as the "OWCP number" for identification of the miner's claim. Further, certain administrative law judges (ALJs) sent out a form of "multi-captioned" hearing notice, listing in a single document the hearing dates for a number of different miners' claims. (J.A. at 131.) In this way, the SSNs of numerous benefits applicants were (1) disclosed to other applicants, their employers, and counsel, and (2) frequently included in publicly released ALJ and Benefits Review Board decisions that, in turn, were published in benefits decision reporters and made available in computerized legal research databases. Appellants are black lung benefits claimants whose SSNs were disclosed in this manner, and they allege in their complaints that the disclosure of their SSNs caused them emotional distress. Buck Doe and five

other Appellants, all suing under pseudonyms, brought this Privacy Act case by filing separate complaints in the district court. Although several additional persons moved to intervene as plaintiffs in this case, the docket sheet indicates that the district court granted leave to intervene only to one of these persons, Tays Doe. (J.A. at 5.) On February 20, 1997, Appellants and the Government consented to the district court's entry of a stipulated order prohibiting the Government from disclosing the SSN of any black lung claimant by including his SSN on multi-captioned hearing notices disseminated to persons not associated with the claimant's claim. Appellants then filed a motion seeking certification of a class comprising "all claimants for Black Lung Benefits since the passage of the Privacy Act." (J.A. at 81.) Both the Government and Appellants moved for summary judgment.

The district court consolidated the seven individual actions and appointed a magistrate judge, pursuant to 28 U.S.C.A. § 636(b)(1)(b), to prepare a Report and Recommendation regarding the summary judgment motions and the motion for class certification. After holding several hearings, the magistrate judge recommended denying summary judgment for Appellants and granting summary judgment for the Government on all claims other than Buck Doe's. Appellants, viewing the basis for the magistrate judge's recommendation as a defect in their pleadings, then moved to file amended complaints alleging emotional distress with greater particularity than was the case in their original complaints, and to file affidavits substantiating their emotional distress claims. The magistrate judge recommended denial of the motion, finding it to be out of time and further concluding that the damages deficiencies in Appellants' cases were failures of proof, not pleading. Subsequently, the district court adopted the magistrate

judge's recommendations that the motion to file amended complaints and supplemental affidavits be denied, that class certification be denied, and that the Government be granted summary judgment on the claims of all Appellants except for Buck Doe. The district court rejected the magistrate judge's recommendation to deny Buck Doe's motion for summary judgment, however, and entered summary judgment awarding Buck Doe $1,000 in statutory damages. The district court held that "actual damages" must be proven to obtain the Privacy Act's $1,000 in statutory damages. Because the district court found that the primary element of damage in privacy cases is ordinarily emotional distress, however, the district court held that proven emotional distress constitutes "actual damages" sufficient to permit recovery of the $1,000 statutory minimum damages amount. The district court held that Buck Doe produced sufficient evidence of emotional distress to justify summary judgment in his favor in the amount of the $1,000 statutory damages award. The district court also found that Appellants had substantially prevailed and were entitled to attorney's fees but did not award a specific amount of attorney's fees, reserving judgment on this issue pending the presentation of a petition for attorney's fees.

Both Appellants and the Government timely appealed, raising a number of challenges to the district court's decision. On appeal, Appellants argue that "actual damages" are not required for recovery of the $1,000 statutory damage amount and that in the alternative, the district court correctly held that emotional distress counts as "actual damages." The Government argues, on the other hand, that "actual damages" are required, that such damages encompass only out-of-pocket or pecuniary harm, rather than non-pecuniary emotional distress, and that even if non-pecuniary emotional distress constitutes compensable

"actual damages," no Appellant produced adequate evidence of such emotional distress to survive summary judgment.

The district court's grant of summary judgment is reviewed de novo. *Providence Square Assoc. v. G.D.F., Inc.*, 211 F.3d 846, 850 (4th Cir. 2000) (stating that a district court's grant of summary judgment is reviewed de novo). After examining the text of the Privacy Act, we will first address the question of whether "actual damages" are a precondition to recovery of statutory minimum damages under the Act. We will then turn to the issues of whether sufficient evidence of "actual damages" to survive summary judgment was presented, the propriety of the district court's denial of Appellants' motion to amend the pleadings and offer supplemental evidence, the district court's denial of class certification, and the district court's rejection of Appellants' claims under the United States Constitution.

II.

The relevant provision of the Privacy Act provides that:

> (4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of–
>
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
>
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4).

The question we must decide is whether a person must suffer "actual damages" in order to be considered "a person entitled to recovery" within the meaning of section 552a(g)(4)(A), and therefore entitled to the statutory minimum of $1,000 under that section. We hold that a person must sustain actual damages to be entitled to the statutory minimum damages award. We find this interpretation ultimately persuasive for several reasons, perhaps no one of which alone would be dispositive, but the aggregate of which are convincing.

First, and most importantly, the operative phrase "a person entitled to recovery" appears in subparagraph (A), the sole and entire purpose of which is to limit the liability of the United States to actual damages sustained. The legislative placement of the phrase in this subparagraph—indeed, within the very same sentence as that limiting Governmental liability to actual damages—almost itself confirms, *as a matter of statutory interpretation,* that the referenced "person entitled to recovery" is one who has suffered actual damages. In effect, through this placement, Congress has defined "recovery" (albeit indirectly) by its express limitation of the Government's liability to actual damages sustained: The authorized "recovery" (apart from costs and attorney fees, which are separately provided for) can only exceed the amount of actual damages where actual damages are greater than $0 but less than $1,000. Thus the provision does not create "statutory damages," but only provides for a "statutory minimum" to actual damages.

It would be odd, to say the least, for Congress to have limited the liability of the United States to actual damages and, in the very same sentence, to have authorized, for a plaintiff to whom the United States is found liable, recovery not merely beyond actual damages, but in the complete absence of such damages. That Congress would have done

so in as circuitous and oblique a fashion as the dissent suggests borders on the inconceivable. By contrast, reading the section to require actual damages gives effect to the eminently reasonable (and generally to be expected) presumption that the legislature correlated the plaintiff's recovery entitlement with the defendant's liability by limiting the plaintiff's recovery to actual damages and by providing, by way of incentive to suit, for at least a minimum recovery even where actual damages are minimal.

Second, and relatedly, we believe that the location of the phrase "a person entitled to recovery" within the very same subparagraph and sentence as the limitation of the Government's liability to actual damages sustained, without any other explicit reference, establishes *as a grammatical matter,* as well, that the reference of this phrase is to one who is able to show actual damages. That is, having just defined the recovery that will be permitted against the United States as that of actual damages, it would torture all grammar to conclude that the phrase "a person entitled to recovery" references anyone other than one who has sustained actual damages.

Third, that the two clauses of (g)(4)(A) are separated by the conjunction "but," serves to reinforce the conclusion that the second clause ("in no case shall a person entitled to recovery receive less than the sum of $1,000") adds a qualification with respect to the class of plaintiffs defined by the first (those who have suffered actual damages)—namely, that in no event shall such person recover less than $1,000.

And, though not necessary to our conclusion, the absence of clear language authorizing an award without a showing of actual damages, where such language is readily available and to be expected, only further underscores the correctness

of a construction that proof of actual damages is required for recovery of the statutory $1,000 minimum. As the dissent acknowledges, Congress, with ease, could have phrased the liability provision to provide unequivocally for a statutory minimum recovery, even for those who are unable to prove actual damages.[2] For instance, section 4 and subsection (A) could have been phrased in the following, or similar, terms: "the United States shall be liable to the individual in an

---

[2] We do not believe that the interpretation of § 552a(g)(4)(A) that we adopt undermines the purposes of the Privacy Act's damages provision, as the dissent asserts. *Post,* at 197. The text of § 552a(g)(4) demonstrates that Congress rationally chose to *augment* damages awards for persons able to demonstrate some "actual damages" in order to encourage citizen enforcement of the Act while denying statutory damages to persons who cannot meet the "actual damages" standard, in order to serve a competing objective: preventing the imposition of potentially substantial liability for violations of the Act which cause no "actual damages" to anyone. The dissent's general observation that "Congress creates statutory damages remedies because it wants to encourage civil enforcement suits," *Post,* at 198, does not establish that Congress meant, in light of competing considerations, to encourage such suits to the degree suggested by the dissent's approach. Furthermore, even assuming that recourse to legislative history is permissible here, the dissent can point to no legislative history addressing how Congress meant to balance these competing considerations in the context of the Act's actual damages provision. *Post,* at 198 n.12 (noting the paucity of legislative history surrounding § 552a(g)(4)(A)'s minimum damages remedy). Instead, the dissent relies on the legislative history of other, *later-enacted* statutes. It is counterintuitive, however, to believe that the purpose of a later Congress comprised of different members and addressing different problems can be imputed back in time to the Congress that enacted the Privacy Act. *See Sigmon Coal Co. v. Apfel,* 226 F.3d 291, 308 n.7 (4th Cir. 2001) (labeling as "dubious" any "attempt at determining whether the apparent intent of one Congress in enacting a statute is at all useful for discovering the intent of another Congress in enacting a separate, unrelated statute"), *aff'd, Barnhart v. Sigmon Coal Co., Inc.,* 534 U.S. 438 (2002).

amount equal to the sum of (A) which-ever is greater: actual damages sustained by the individual as a result of the refusal or failure, or $1,000." That instead of such an unambiguous directive, Congress, in this simple, straightforward statute expressly providing for the recovery of actual damages against the United States, provided *sub silentio* for an award to one who has not even suffered actual damages at all, strains the powers of reasonable inference.

The dissent's primary point is, as it frankly acknowledges, an implicit one. *Post,* at 188-89. And as such, we would be constrained to reject it in favor of the textual analysis that we undertake above.[3] We reject the dissent's textual assertion that "recovery," as used in § 552a(g)(4)(A), should be read to reference § 552a(g)(4)(A)'s provision for an award of costs and attorney's fees, not only for the textual reasons recited, but also because the key phrase, "a person entitled to recovery," appears in the statute prior to the provision for costs and attorney's fees. We do not believe that Congress would have invoked a term whose definition is dependent upon a subsequent statutory provision. Furthermore, in the context of § 552a(g)(4)(A), which concerns itself with damages stemming from a violation of the Act rather than costs incurred in litigation, "recovery" is not plausibly read to reference litigation costs in the absence of any underlying compensable injury. We acknowledge that our

[3] Nor has any court examined closely the question we consider today, and none has analyzed the text of the statute at all. Those courts that have come to the same conclusion as the dissent rely exclusively on *ipse dixit, see Wilborn v. HHS,* 49 F.3d 597, 603 (9th Cir. 1995); *Parks v. IRS,* 618 F.2d 677, 682-83 (10th Cir. 1980); *Fitzpatrick v. IRS,* 665 F.2d 327, 331 (11th Cir. 1982); *Waters v. Thornburgh,* 888 F.2d 870, 872 (D.C.Cir. 1989), entitling them to no persuasive force whatsoever.

interpretation of section 552a(g)(4)(A) to require proof of actual damages as a condition for receipt of the statutory minimum award is not strictly compelled by the statute's language. We are convinced, however, that, for the aforesaid reasons, this construction is the most persuasive reading of the section. But even were the interpretive issue closer, the ambiguity would, in accordance with established principles of sovereign immunity, have to be resolved in favor of the interpretation we adopt today, because section 552a's damages provision represents a limited waiver of sovereign immunity. As the dissent itself concedes, "[i]t is, of course, clear that [if the sovereign immunity canon applies,] we must accept the narrower of two equally convincing interpretations." *Post,* at 195.[4]

It is axiomatic that limited waivers of the federal Government's sovereign immunity must be "strictly construed . . . in favor of the sovereign." *Lane v. Pena,* 518 U.S. 187, 192 (1996). A limited waiver of sovereign immunity must not be "enlarged beyond what the language

[4] The decisions from our sister circuits likewise support the conclusion that the scope of the Privacy Act's damages provision is to be interpreted in accordance with this principle of strict construction. *See Hudson v. Reno,* 130 F.3d 1193, 1207 n.11 (6th Cir. 1997) (holding that the doctrine that "courts must strictly construe waivers of immunity" requires that the Privacy Act damages provision, "when it is being applied against the Government ... must be narrowly interpreted" on the question of whether § 552a(g)(4)(A)'s "actual damages" include damages for emotional distress, loss of reputation, embarrassment, or other non-quantifiable injuries), *overruled in part on other grounds by Pollard v. E.I. du Pont de Nemours & Co.,* 532 U.S. 843 (2001); *Tomasello v. Rubin,* 167 F.3d 612, 618 (D.C.Cir. 1999) (finding that § 552a(g)(4) is governed by the strict construction mandated by *Nordic Village* on the question of whether related, contemporaneous disclosures must be treated as a single disclosure for purposes of the Act's $1,000 statutory damages amount).

requires." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (internal citation omitted); *see also Lane*, 518 U.S. at 192. This principle of "strict construction" extends beyond the mere fact of waiver, to the "scope" of a waiver, which also must "be strictly construed . . . in favor of the sovereign." *Lane*, 518 U.S. at 192.

Needless to say, determining whether or not subparagraph (A) allows plaintiffs to receive statutory damages without first proving actual damages is a question of the scope of damages available under the subparagraph. The narrower reading of the statute that we adopt herein, therefore, would have to prevail over the dissent's by virtue of this stricter construction "in favor of the sovereign," *id.*, even were there more ambiguity in the statutory text.

III.

Having determined that the district court correctly ruled that proven "actual damages" are a precondition to recovery of § 552a(g)(4)(A)'s statutory minimum damages award, we now turn to the merits of the district court's ruling that Buck Doe succeeded in proving "actual damages" and was entitled to summary judgment in the amount of the Act's $1,000 statutory damages award. The district court held that proven emotional distress constitutes "actual damages" under § 552a(g)(4)(A) and that Buck Doe introduced uncontroverted evidence of such damages, sufficient to entitle him to summary judgment. On appeal, Appellants defend this ruling, while the Government argues that Buck Doe failed to introduce sufficient evidence of compensable emotional distress and that, in the alternative, the term "actual damages" as used in the Act does not include damages for emotional distress.

An award of compensatory emotional distress damages requires evidence "establish[ing] that the plaintiff suffered

demonstrable emotional distress, which must be sufficiently articulated; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a . . . violation occurred supports an award of compensatory damages."[5] *Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir. 1996). A plaintiff's own conclusory allegations that he felt "embarrassed," "degraded," or "devastated," and suffered a loss of self-esteem, will not suffice to create a disputed issue of material fact for the jury regarding the presence of compensable emotional distress. *Id.* at 1255; *see also Brady v. Fort Bend County*, 145 F.3d 691, 718-19 (5th Cir. 1998) (in a § 1983 action, "vague and conclusory" testimony that a claimant was "highly upset," could not "accept it mentally," "didn't feel like the same person," or "spent more time on the couch" does not satisfy the specificity standard for compensable emotional distress). Where, on the other hand, a plaintiff can produce evidence that emotional distress caused chest pains and heart palpitations, leading to medical and psychological treatment which included a formal diagnosis of "major depressive disorder," as well as necessitated prescription medication, it is clear that some amount of compensatory damages for emotional distress is warranted. *Knussman v. Maryland*, 272 F.3d 625, 640 (4th Cir. 2001).

---

[5] *Price* was decided in the context of claims arising under 42 U.S.C.A. § 1983, but we see no reason why the Privacy Act does not require at least the same particularized showing of emotional distress which is a prerequisite to recovery of emotional distress damages for the violation of the most precious of rights, those secured by the United States Constitution. *See, e.g., Southern Express Co. v. Byers*, 240 U.S. 612, 615 (1916) (noting, in the context of a common-law cause of action, "the elementary principle that mere pain and anxiety are too vague for legal redress") (internal quotation marks omitted).

In determining whether sufficient evidence exists to support an award of more than nominal damages for emotional distress, we examine factors such as the need for medical, psychological, or psychiatric treatment, the presence of physical symptoms, loss of income, and impact on the plaintiff's conduct and lifestyle. *Price,* 93 F.3d at 1255. In *Price,* we held that failure to establish emotional distress with sufficient evidence will result in the award of only nominal damages.[6] *Id.* Nominal damages, when available, are designed to vindicate legal rights "without proof of actual injury." *Carey v. Piphus,* 435 U.S. 247, 266

[6] It bears note that in *Price,* we addressed the showing necessary to justify an award of more than nominal damages for emotional distress, not the showing necessary to justify an award that is above some relatively high threshold of "substantiality," as the dissent appears to suggest. *Post,* at 200 n.15; *Price,* 93 F.3d at 1256 (awarding nominal damages to plaintiffs because they could not "prove emotional distress warranting compensatory damages"). *Price* is thus concerned with the level of evidence needed to support a conclusion that a plaintiff's emotional injuries were more than *de minimis* or ephemeral, in other words, adequate to warrant more than a nominal damage award for the technical invasion of a plaintiff's rights. *Id.* at 1256. Thus, the *Price* framework is not inappropriately rigorous in the context of the Privacy Act's "actual damages" requirement. To the contrary, as the dissent notes, the Act's "actual damages" requirement is distinct from and more rigorous than the requirement of an "adverse effect." *Post,* at 186 n.2, 188. Thus, claims of emotional injury, to satisfy the "actual damages" requirement, must meet a threshold *higher* than the "injury in fact" threshold applicable to the "adverse effect" inquiry. It follows that a showing of "very minor emotional distress," *Post* at 199, which, one supposes, would have to include *any* amount of momentary annoyance, angst, or irritation that might support a nominal damages award, cannot possibly suffice to establish "actual damages" under the Act. The consequent possibility that some "plaintiffs who suffer very minor harms will go uncompensated," *Post,* at 203, is the price of the "actual damages" provision's gatekeeping function of avoiding tremendous overcompensation of plaintiffs whose damages evidence fails to establish any meaningful injury at all.

(1978). An award of merely nominal damages means that a plaintiff has *not* shown "actual injury." Thus, if Buck Doe's emotional distress evidence would entitle him only to nominal damages under the *Price* framework, he has shown no "actual injury," in other words, no "actual damages sustained."

Buck Doe's evidence of emotional distress in this case falls far below the level which our precedent demands before the issue of compensatory damages for emotional distress may be submitted to the finder of fact. He testified that he was "greatly concerned and worried" about the disclosure of his SSN; that he felt his privacy had been violated in "words he cannot describe"; that he felt the consequences of the disclosure of his SSN could be "devastating" for himself and his wife, and that the disclosure of his SSN had "torn [him] all to pieces," in a manner that "no amount of money" could ever compensate. (J.A. at 55-56.) Compare *Price,* 93 F.3d at 1254-56 (holding that statements that one felt "embarrassed," "degraded," "devastated," etc., do not create a disputed issue of fact as to entitlement to compensatory damages for emotional distress); *Brady,* 145 F.3d at 718-20 (holding that there was no issue of fact as to entitlement to more than nominal damages for emotional distress based upon testimony that claimant was "highly upset," "spent more time on the couch," etc.). Buck Doe did not produce any evidence of tangible consequences stemming from his alleged angst over the disclosure of his SSN. He claimed no medical or psychological treatment, no purchase of medications (prescription or over-the-counter), no impact on his behavior, and no physical consequences. Further, no evidence of any kind corroborates the conclusory allegations in Buck Doe's affidavit. Under these circumstances, we need not reach the issue of whether the

term "actual damages" as used in the Act encompasses damages for non-pecuniary emotional distress because, regardless of the disposition of that issue, Buck Doe's claims fail for lack of evidentiary support.[7] In turn, because we have concluded that "actual damages" are a prerequisite to the recovery of statutory minimum damages, and because Buck Doe utterly failed to produce evidence sufficient to permit a rational trier of fact to conclude that he suffered any "actual damages," the district court's entry of summary judgment in Buck Doe's favor as to his entitlement to a statutory "actual damages" award must be reversed, and we must remand with instructions to enter summary judgment in favor of the Government on his claim.

IV.

We next address Appellants' challenge to the district court's refusal to allow them to amend their complaints or to proffer supplemental evidence supporting their emotional distress claims. After the magistrate judge recommended granting summary judgment for the Government, Appellants moved to amend their complaints and to file additional affidavits in support of their damages case. The magistrate judge recommended denying Appellants leave to amend

[7] The emotional distress allegations of the other Appellants are even less well-supported than Buck Doe's allegations and likewise fail. For example, Robert Doe testified that "nothing bad happened to [him] but [he] guess[ed] it could." (J.A. at 151.) The claims of plaintiffs other than Buck Doe are so totally lacking in any evidence of injury of any kind that, as the dissent concedes, they fail the Act's threshold "adverse effect" requirement, which is a threshold statutory standing principle, distinct from and less demanding than the "actual damages" requirement, that requires some negative consequence sufficient to constitute "injury in fact," separate from and caused by a violation of the Act. *See Quinn v. Stone*, 978 F.2d 126, 135 n.15 (3d Cir. 1992) (noting the distinction between "actual damages" and "adverse effect").

their complaints and to submit additional damages evidence. The magistrate judge reasoned that the proffered amendments to the complaints were belated and that, without making a showing of cause for the failure to submit the evidence earlier, a party is not entitled to submit additional evidence to resist summary judgment after a motion has been decided. The magistrate judge further reasoned that Appellants were on notice of the possible need to prove actual damages prior to the issuance of the recommendation to grant summary judgment. The district court, after a de novo review, adopted the magistrate judge's recommendation and denied Appellants' motion.

Appellants argue that the district court abused its discretion in denying them leave to amend their pleadings to include more specific allegations of emotional damages because leave to amend pleadings should be granted liberally.[8] *Island Creek Coal Co. v. Lake Shore, Inc.*, 832 F.2d 274, 279 (4th Cir. 1987) (noting that the policy favoring the adjudication of cases on the merits requires that

[8] Appellants also argue that the magistrate judge behaved improperly when, after the Government by letter stated that it did not intend to object to the amended pleadings and new material, the magistrate judge allegedly, in a telephone conference with counsel, urged the Government to change its position. The Government denies that the substance of this telephone conference was as Appellants allege. The Government clarifies that it did not actually consent to the amendment, which under Federal Rule of Civil Procedure 15(a), would have required the court to grant the amendment, but simply stated that it did not intend to object to the amendment. We hold that the district court did not abuse its discretion in recognizing the Government's decision, prior to the disposition of the motion to amend, to withdraw whatever consent had been conveyed by its earlier letter. Further, assuming that the magistrate judge stated to the Government that the pending motion to amend could, if granted, lead to a finding of liability, nothing suggests that the magistrate judge coerced the Government into changing its position.

leave to amend be given liberally when "justice so requires"). We conclude that the denial of Appellants' motion for leave to amend their complaints has no bearing on the outcome in this case because allegations in the pleadings would not suffice to survive summary judgment in any event. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (noting that a party resisting summary judgment "may not rest upon mere allegations or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue for trial"). Instead, the relevant issue is the refusal to accept new affidavits to buttress Appellants' damages evidence.

We review the district court's refusal to accept Appellants' supplemental affidavits on the issue of damages for abuse of discretion. *See United States v. Howell*, 231 F.3d 615, 622-23 (9th Cir. 2000) (reviewing for abuse of discretion a district court's refusal to permit the production of new evidence following a magistrate judge's recommendation regarding a dispositive motion).[9]

[9] Without adequate justification for the failure to present the evidence in question earlier, a district court may ignore belatedly tendered evidence offered in opposition to summary judgment after the court has ruled on a summary judgment motion. *Cray Communications, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 395 (4th Cir. 1994); *cf. Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995) (noting that a party seeking an extension of time to respond to a summary judgment motion must timely file affidavits specifying which aspects of discovery require more time to complete). While the new evidence was proffered between the magistrate judge's recommendation and the district court's adoption of the recommendation, Appellants do not argue that this fact is of any significance. The relevant statute states that a district court reviewing a magistrate judge's recommendation *must* review de novo disputed portions of a magistrate's report and "*may* also receive further evidence." 28 U.S.C.A. § 636(b)(1) (West 1993) (emphasis added). Because Congress used the permissive term "may" in connection with the receipt of additional evidence, the question of whether to consider such evidence rests within the sound discretion of the district court.

Appellants claim that they were not on notice regarding the need to produce evidence of actual damages to resist summary judgment and that this alleged lack of notice supports a finding that the district court abused its discretion in refusing to allow the filing of supplemental damages evidence. This contention is not well-founded because the Government, in a memorandum in support of its motion for summary judgment filed over a year prior to the magistrate judge's recommendation, argued that the Sixth Circuit's "actual damages" standard, as articulated in *Hudson v. Reno*, 130 F.3d 1193, 1207 (6th Cir. 1997), should govern and pointed to the absence of evidence sufficient to create a factual dispute as to actual damages under the *Hudson* standard. (Mem. in Support of Defendant's Supplemental Motion for Summary Judgment, at 21-24.) Having chosen not to present evidence of "actual damages" prior to the magistrate judge's recommendation, after the Government specifically argued that the governing law required such evidence, Appellants took a calculated risk that they would face an evidentiary insufficiency if they lost their legal argument regarding the need to prove "actual damages." We thus conclude that the district court did not abuse its discretion in declining to permit the presentation of new evidence on the ground that Appellants did not show cause for their failure to present it earlier.

V.

Appellants next challenge the district court's denial of their motion for class certification. A decision of a district court granting or denying a motion for class certification is reviewed on appeal for abuse of discretion, but the district court must exercise its discretion within the confines of

Federal Rule of Civil Procedure 23. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001). The district court denied Appellants' motion for class certification on the ground that emotional damages require too much individualized proof to render the named representatives' claims typical of those of the class. The magistrate judge, in recommending denial of class certification, reasoned that emotional damages are likely to be so variable and fact-specific that damages issues overwhelm liability, precluding class certification. *See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342-44 (4th Cir. 1998) (holding that the individualized nature of damages can, under some circumstances, destroy typicality).

Appellants argue that the district court's denial of class certification was erroneous because, in their belated amendments to their complaints, they decided to pursue only the $1,000 minimum statutory damages, so that damages are in fact identical for all class members. If their amendments had been accepted, however, Appellants still would have faced grave typicality problems for two reasons. First, an adverse effect is a core liability requirement for a Privacy Act suit. The Act allows a private suit against an agency when the agency "fails to comply with any . . . provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual . . . ." § 552a(g)(1)(D) (West 1996 & Supp. 2001). And second, as we have demonstrated in Part II *supra,* the Act requires proof of actual damages to obtain a damage award. No Appellant in this case, other than Buck Doe, could even show an adverse effect, and Buck Doe was unable to demonstrate actual damages. Assuming that the claims of unnamed class members include a number of claims for which there is some evidence of adverse effect and actual damages, the putative class representatives have

not suffered "injur[ies] similar to the injuries suffered by the other class members." *McClain v. South Carolina Nat'l Bank,* 105 F.3d 898, 903 (4th Cir. 1997). Additionally, the Government correctly notes that the proposed class was drafted without regard to the two- year statute of limitations for Privacy Act claims, *see* 5 U.S.C.A. § 552a(g)(5), so that the overwhelming majority of claims included in the proposed class may be time-barred. Brief of Appellee at 41. This, too, undermines typicality because the claims of the named representatives would differ from those of unnamed class members with potentially time-barred claims. Accordingly, the district court did not abuse its discretion in declining to certify the proposed class.

VI.

Finally, Appellants challenge the district court's rejection of their claim that the disclosure of their SSNs violated their right to privacy under the United States Constitution. The district court's grant of summary judgment for the Government is reviewed de novo. *Providence Square Assoc., L.L.C. v. G.D.F., Inc.,* 211 F.3d 846, 850 (4th Cir. 2000).

At the threshold, the Government argues that Appellants' constitutional claims are moot. These claims are indeed moot because (1) the consent decree entered into by the Government prospectively enjoins all of the conduct challenged by Appellants and (2) no money damages are available because a *Bivens action does not lie against either agencies or officials in their official capacity. See FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994) (holding that a Bivens action is unavailable against agencies); *Randall v. United States,* 95 F.3d 339, 345 (4th Cir. 1996) ("Any remedy under *Bivens* is against federal officials individually, not the federal government."). Thus, no further effective relief can

be given Appellants on their constitutional claims because they already have complete injunctive relief and no damages are available. We therefore refrain from addressing these claims on the merits.

VII.

Because the Privacy Act requires proof of "actual damages" for an award of statutory minimum damages and because Buck Doe failed to provide sufficient evidence of actual damages to survive the Government's summary judgment motion, we reverse the district court's grant of summary judgment in Buck Doe's favor and direct on remand that summary judgment be entered in the Government's favor as to Buck Doe's claims. Because no Appellant other than Buck Doe produced any evidence of an "adverse effect" under the Act, we affirm the district court's grant of summary judgment in the Government's favor on the claims of all of the other Appellants. We affirm the district court's denial of class certification, and we decline to address as moot Appellants' constitutional claims.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MICHAEL, Circuit Judge, concurring in part and dissenting in part:

I largely agree with the majority's ultimate disposition of most of this case, but this agreement in result cannot paper over my significant disagreement with the majority's interpretation of the Privacy Act. Most fundamentally, I respectfully dissent from the majority's conclusion in part II of its opinion that only a plaintiff who can prove actual damages is entitled to recover statutory damages under 5 U.S.C. § 552a(g)(4). Even if the statute must be narrowly construed as a waiver of sovereign immunity, it will not

bear the interpretation the majority adopts today. I would hold that a plaintiff can recover statutory damages of $1,000 upon proof that he has suffered an adverse effect as a result of an intentional or willful violation of the Privacy Act. § 552a(g)(1)(D), (g)(4). Because Buck Doe has offered sufficient evidence that he was adversely affected by the Department of Labor's wrongful dissemination of his social security number, I would remand his case for trial. I would affirm the district court's grant of summary judgment to the Secretary against the other six Doe plaintiffs on the alternative ground that those plaintiffs failed to present any evidence of adverse effects resulting from the Department's violation of the Privacy Act. I join the majority's treatment of the class certification issue in part V of its opinion except to the extent that the majority's discussion depends on its view that proof of actual damages is a prerequisite for the recovery of statutory damages.[1] I join parts IV and VI of the majority opinion in full.

I.

The principal issue in this case is whether proof of actual damages is a prerequisite to the recovery of statutory damages under the Privacy Act. Although I dissent from the majority's holding on that issue, I begin my analysis by briefly covering the ground the majority and I share. Specifically, I explain why I agree with the majority that the district court properly entered summary judgment against all the plaintiffs except Buck Doe because none of those

---

[1] I agree with the majority that the plaintiffs' proposed class definition was sufficiently overbroad to fail the typicality requirement. *See ante* at 183-84. Though the district court could have narrowed the class definition on its own initiative, its failure to do so was not an abuse of discretion. *See Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp.*, 993 F.2d 11, 14-15 (2nd Cir. 1993).

plaintiffs satisfied the Privacy Act's adverse effect requirement.

Subsections (A) through (C) of the Privacy Act's civil remedies provision, 5 U.S.C. § 552a(g)(1), authorize suit for certain specified violations of the Act. Subsection (D) is a catchall provision that authorizes suits against any agency that "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D). Because the Does' Privacy Act claims fall under subsection (D), each of them must prove that he suffered an adverse effect as a result of the Department of Labor's wrongful disclosure of his social security number in order to have standing to sue.

A plaintiff can satisfy the adverse effect requirement in § 552a(g)(1)(D) even if he has sustained no actual damages, for the meaning of "adverse effect" in subsection (g)(1)(D) is both distinct from and broader than the meaning of "actual damages" in subsection (g)(4)(A). *See Quinn v. Stone*, 978 F.2d 126, 135 n.15 (3d Cir. 1992).[2] The district court, after adopting an extremely loose reading of the adverse effect requirement, held that all of the Does satisfied the requirement. In essence, the court read the adverse effect language in § 552a(g)(1)(D) as requiring a plaintiff to demonstrate only that the government intentionally and willfully mishandled the plaintiff's own

[2] A few courts appear to ignore the distinction between adverse effects and actual damages by holding that only proof of economic loss qualifies as an adverse effect. *See, e.g., Risch v. Henderson*, 128 F. Supp. 2d 437, 441 (E.D.Mich. 1999). This cannot be correct. Indeed, the Secretary concedes in her brief that the terms "adverse effect" and "actual damages" have different meanings. *See* Brief of Appellee/Cross Appellant Chao at 22 n.3.

personal information (as opposed to that of some third party). Most courts, however, closely scrutinize a plaintiff's claim for evidence of adverse effects in a way that conflicts with the district court's permissive approach to the requirement. *See, e.g., Quinn*, 978 F.2d at 135-37; *Albright v. United States*, 732 F.2d 181, 186-88 (D.C.Cir. 1984). As the Third Circuit has explained, the adverse effect requirement actually contains two prongs: a standing requirement (the plaintiff must have suffered a cognizable injury) and a requirement that the adverse effect be caused by the agency's violation of the Act. *See Quinn*, 978 F.2d at 135. The causal prong makes it especially clear that an adverse effect must be something distinct from the intentional and willful violation itself. For if a violation of the Privacy Act was sufficient to constitute an adverse effect, there could be no question of whether the violation *caused* the adverse effect, and hence the causal prong would be superfluous. As a result, the district court set the bar of the adverse effect requirement too low by not insisting that the Does offer evidence of adverse effects separate from, and caused by, the Department of Labor's willful and intentional violation of their Privacy Act rights.

That said, an adverse effect can take many different forms depending on which provisions of the Privacy Act have been violated. Financial harm is the most tangible adverse effect that can result from an agency's wrongful disclosure of a social security number. We have observed that an "unscrupulous individual" armed with a person's social security number "could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck." *Greidinger v. Davis*, 988 F.2d 1344, 1353 (4th Cir. 1993). Obviously, a person suffers an adverse effect when his

social security number is used by another to commit some crime of identity fraud, but a plaintiff can also be adversely affected before any crime occurs by distress about possible misuse of his illegally disclosed social security number. Most courts have held that mental distress or emotional harm of this kind is sufficient to constitute an adverse effect. *See, e.g., Quinn,* 978 F.2d at 135-36 (holding that stress and emotional anguish are sufficient to establish adverse effect); *Albright,* 732 F.2d at 186 (stating that "emotional trauma alone is sufficient to qualify as an 'adverse effect' "); *Parks v. IRS,* 618 F.2d 677, 682-83 (10th Cir. 1980) (stating that psychological harm can constitute an adverse effect). It follows that, at minimum, Buck Doe proffered evidence that he had suffered adverse effects sufficient to survive summary judgment when he declared in his affidavit that "no amount of money could compensate [him] for worry and fear of not knowing when someone would use [his] name and social security number to . . . use [his] checking account or even get credit cards." If found credible by the trier of fact, Buck Doe's testimony that he worried about the possible misuse of his social security would satisfy the adverse effect requirement.

The harder question is what to do with the remaining Doe plaintiffs. Their social security numbers, like Buck Doe's, were wrongfully disclosed to strangers. Given the many troubling consequences that could flow from this disclosure, persons in their position could be expected to experience at least some degree of distress at the prospect that their social security numbers might be misused. Yet, aside from Buck Doe, none of the plaintiffs offered any evidence of such distress. The question, then, is whether we can simply presume that they have suffered emotional harms sufficient to qualify as adverse effects under § 552a(g)(1)(D). The question is not likely to arise with any frequency because

serious plaintiffs will not ordinarily fail to offer evidence that they have been harmed by agency violations of their privacy. Still, I believe that adverse effects must be proven rather than merely presumed, and the plaintiffs other than Buck Doe have failed to present evidence of adverse effects sufficient to survive summary judgment. Accordingly, I would affirm the district court's grant of summary judgment to the Secretary against the remaining Doe plaintiffs on the alternative ground that those plaintiffs failed to present any evidence that they suffered adverse effects from the agency's wrongful disclosure of their social security numbers. I now turn to the more difficult task of discussing the fate of Buck Doe's Privacy Act claim.

II.

Recovery in subsection (D) Privacy Act suits is governed by § 552a(g)(4), which provides:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of-
> (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and
> (B) the costs of the action together with reasonable attorney fees as determined by the court.

5 U.S.C. § 552a(g)(4).

The majority and I agree that to recover statutory damages under the Privacy Act, an individual must prove that he has suffered an adverse effect as a result of an agency's intentional or willful violation of the Act. We also

agree that emotional distress can qualify as an adverse effect and that Buck Doe's statements about his emotional distress are sufficient to allow a finding that he suffered an adverse effect as a result of the Department of Labor's wrongful disclosure of his social security number. Finally, we agree that proof sufficient to establish an adverse effect may be insufficient to establish actual damages. We disagree, however, on the question of whether proof of actual damages is a prerequisite to the recovery of statutory damages.

The majority holds that, purely as a matter of textual analysis, statutory damages under the Privacy Act may be recovered only by a plaintiff who can prove that he has sustained actual damages. It refrains from deciding whether the term "actual damages" can include emotional distress or is limited to out- of-pocket losses. Instead, the majority assumes for the sake of argument that proof of emotional distress could entitle a plaintiff to actual damages, but holds that Buck Doe's conclusory claims of emotional distress are insufficient. Though the question is somewhat close, the majority's textual arguments do not convince me that a "person entitled to recovery" in subsection (g)(4)(A) must be someone who has sustained actual damages. I believe the phrase "person entitled to recovery" is more naturally read to mean anyone to whom "the United States shall be liable . . . in an amount equal to the sum of" the amounts specified in subparagraphs (A) and (B). Such a person is entitled to recovery because he has proven that he suffered an adverse effect as a result of an agency's intentional or willful violation of the Privacy Act. I think it quite relevant, though the majority apparently does not, that the language in § 552a(g)(4) and similar language in other statutes has been widely read to mean exactly what I believe it means. My biggest problem with the majority's textual analysis,

however, is the majority's assumption that we can decide whether proof of actual damages is a prerequisite to the recovery of statutory damages without any attention either to the question of what the term "actual damages" means or to the policies that led Congress to create a statutory damages provision as part of the Privacy Act in the first place. In my view, expanding the scope of inquiry to include these considerations makes it clear that the statute should not be read to condition the recovery of statutory damages on proof of actual damages. Nevertheless, I will first attempt to meet the majority's analysis on its own terms by assuming with the majority that we can properly decide whether proof of actual damages is a prerequisite to the recovery of statutory damages solely by analyzing the meaning and placement of the phrase "person entitled to recovery" in subsection (g)(4)(A).

A.

1.

Section 552a(g)(4)(A) unambiguously provides that a "person entitled to recovery" shall receive at least statutory damages of $1,000. The critical textual question, of course, is who counts as a "person entitled to recovery." The majority argues that a person entitled to recovery must be someone who has sustained actual damages. In my opinion, the majority relies too heavily on where the phrase is placed in subparagraph (A) while giving insufficient emphasis to the ordinary meaning of the word "recovery." As a matter of ordinary language usage, an entitlement to "recovery" is surely broader than an entitlement to actual damages. Thus, the statute is more naturally read to say that anyone to whom the United States "shall be liable" in the amounts specified in subparagraphs (A) and (B) is a "person entitled to recovery." The majority's cramped reading of

"recovery" would make more sense if actual damages were the only remedy provided by the statute, but they are not. Instead, the text of the statute allows for a plaintiff who has proven an intentional or willful violation of the Privacy Act to recover costs and reasonable attorney fees even if the plaintiff has suffered no actual damages at all.[3] On the majority's reading, such a person is not "entitled to recovery" even though the United States is liable to that person for costs and attorney fees. A reading that so strongly conflicts with the ordinary meaning of "recovery" ought to be rejected.[4]

Three additional reasons support my reading of the statute. First, the majority of courts to interpret § 552a(g)(4) have allowed recovery of statutory damages without proof of actual damages. In fact, disagreement about this issue arose only when courts began to interpret the statute in the light of the principle that waivers of the

---

[3] This would still be true even if the majority was correct in holding that a plaintiff who cannot prove actual damages will recover no damages at all. It may seem odd that a plaintiff could be entitled to costs and attorney fees without being entitled to any damages, but any apparent oddity in this result only reinforces my point that statutory damages should be available under the Act without proof of actual damages.

[4] The majority finds this argument unpersuasive. After observing that "person entitled to recovery" appears before costs and attorney fees are provided for, the majority reasons that Congress would not have made the definition of "person entitled to recovery" "dependent upon a subsequent statutory provision." *Ante* at 179. The problem with the majority's argument, however, is that on my reading the definition of "person entitled to recovery" is not dependent on a subsequent provision. Rather, a person entitled to recovery is someone to whom "the United States shall be liable ... in an amount equal to the sum of" the amounts referred to in subparagraphs (A) and (B). That language appears prior to the use of "person entitled to recovery" in subparagraph (A).

federal government's sovereign immunity must be narrowly construed. Second, my interpretation is consistent with that adopted by the Office of Management and Budget (OMB), the agency charged with implementing the Privacy Act. Third, statutory damages provisions that are similar in structure, language, and purpose to § 552a(g)(4) have been uniformly understood to allow recovery of statutory damages without proof of actual damages. Indeed, the legislative history of these provisions clearly evinces Congress's intent to allow recovery of minimum statutory damages without proof of actual damages. I will expand on each of these points.

First, most circuit courts have read the Privacy Act to allow recovery of statutory damages without proof of actual damages. *See Wilborn v. HHS,* 49 F.3d 597, 603 (9th Cir. 1995) (stating that statutory damages may be awarded to plaintiffs with no provable damages); *Quinn,* 978 F.2d at 131 (listing adverse effect, but not actual damages, as an element that must be proved in order to recover damages under the Privacy Act for wrongful disclosure of personal records); *Waters v. Thornburgh,* 888 F.2d 870, 872 (D.C.Cir. 1989) (stating that if a plaintiff can establish that he was adversely affected by an intentional or willful violation of the Act, he "is entitled to the greater of $1,000 or the actual damages sustained"); *Johnson v. Dep't of Treasury,* 700 F.2d 971, 972 & n.12 (5th Cir. 1983) (stating that the statutory minimum of $1,000 is "of course" recoverable even without proof of actual damages); *Fitzpatrick v. IRS,* 665 F.2d 327, 330-31 (11th Cir. 1982) (stating that plaintiffs who failed to prove actual damages could recover statutory damages); *Parks,* 618 F.2d at 682-83 (holding that plaintiffs who sought minimum statutory damages had stated a claim for relief when they alleged facts showing an intentional or willful violation of the Act

that caused psychological harm constituting an adverse effect); *but see Hudson v. Reno,* 130 F.3d 1193, 1207 & n.11 (6th Cir. 1997) (holding that proof of actual damages is a prerequisite to recovery of statutory damages on the ground that waivers of the federal government's sovereign immunity must be narrowly construed in favor of the government). Until today, we had assumed, albeit in dicta, that the prevailing view was correct. *See Thurston v. United States,* 810 F.2d 438, 447 (4th Cir. 1987).

The majority appears to regard the decisions favoring my reading of the Privacy Act as irrelevant because none undertakes the sort of textual analysis favored by the majority. That point is true enough, but it is worth observing that sometimes courts fail to engage in textual analysis simply because they think a point is too obvious to require discussion. Although I acknowledge that judicial head counting is not an infallible method of determining the meaning of a statute, the prevalence of my reading in the circuits is at least some evidence against the plausibility of the majority's reading. Indeed, I think we ought to be troubled that, with one possible exception, the only circuit ever to rule that a plaintiff must prove actual damages in order to recover statutory damages based its conclusion not on its reading of the text, but on the principle that waivers of sovereign immunity must be narrowly construed in favor of the government. *See Hudson,* 130 F.3d at 1207 & n.11.[5]

---

[5] The D.C. Circuit's decision in *Molerio v. FBI,* 749 F.2d 815, 826 (D.C.Cir. 1984), a case that did not appeal to sovereign immunity principles, is sometimes cited as evidence that the D.C. Circuit has adopted the position that proof of actual damages is a prerequisite for the recovery of statutory damages. The precedential force of *Molerio* on this point is unclear because the D.C. Circuit has subsequently said that proof of an adverse effect *is* sufficient to recover statutory damages. *See Waters,* 888 F.2d at 872.

Second, my reading is consistent with the guidelines for implementing the Privacy Act developed by OMB. Privacy Act Guidelines, 40 Fed. Reg. 28,949 (July 9, 1975). The OMB guidelines explain that when a court

> finds that an agency has acted willfully or intentionally in violation of the Act in such a manner as to have an adverse effect upon the individual, the United States will be required to pay
>
> Actual damages or $1,000, whichever is greater
>
> Court costs and attorney fees.

Id. at 28,970. These guidelines "are due the deference accorded to the interpretation of an agency charged with 'oversight' of implementation." *Quinn,* 978 F.2d at 133. *See also* Privacy Act § 6, 88 Stat. 1896, 1909 (1974) (authorizing the OMB guidelines); *Albright,* 631 F.2d at 919-20 n.5 (explaining that the OMB guidelines are particularly worthy of deference because they " 'involve[ ] a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, or making the parts work efficiently and smoothly while they are yet untried and new' " (quoting *Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978))).

Third, my interpretation is supported by both the legislative history and the judicial interpretation of statutory damages provisions similar in language, structure, and purpose to § 552a(g)(4). In 1976, only two years after passage of the Privacy Act, Congress created a civil remedy for unauthorized disclosure of tax returns and tax return information. As originally enacted, the statute read:

> In any suit brought under the provisions of subsection (a), upon a finding of liability on the part of the defendant,

the defendant *shall be liable* to the plaintiff in an amount *equal to the sum of—*

(1) *actual damages sustained by the plaintiff* as a result of the unauthorized disclosure of the return or return information and, in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, *but in no case shall a plaintiff entitled to recovery* receive less than the sum of $1,000 with respect to each instance of such unauthorized disclosure; and

(2) the costs of the action.

26 U.S.C. § 7217(c) (Supp. 1981) (emphasis added), *repealed* 1982. While somewhat more complex than § 552a(g)(4), this statute poses essentially the same question of interpretation presented by this case, namely, is a plaintiff "entitled to recovery" someone who has sustained actual damages or is he simply someone to whom the defendant "shall be liable" in a specified sum. Congress gave its answer in the statute's legislative history, explaining its creation of a statutory damages remedy for unlawful disclosure of tax return information as follows:

> Because of the difficulty in establishing in monetary terms the damages sustained by a taxpayer as the result of the invasion of his privacy caused by an unlawful disclosure of his returns or return information, the amendment provides that these damages would, in no event, be less than liquidated damages of $1,000 for each disclosure.

S.Rep. No. 94-938, at 348 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2897, 3778. Not surprisingly, courts uniformly interpreted § 7217(c) to allow recovery of statutory damages without requiring proof of actual

damages. *See, e.g., Johnson v. Sawyer,* 120 F.3d 1307, 1313 (5th Cir. 1997) (stating that under § 7217 "a plaintiff is entitled to his actual damages sustained as a result of an unauthorized disclosure . . . or to liquidated damages of $1,000 per such disclosure"); *Rorex v. Traynor,* 771 F.2d 383, 387-88 (8th Cir. 1985) (holding that plaintiffs were entitled to minimum statutory damages under § 7217(c) despite their failure to prove any actual damages). Section 7217 was repealed in 1982 and replaced by 26 U.S.C. § 7431(c), which has also been read to authorize the award of statutory damages without requiring the plaintiff to prove actual damages. *See, e.g., Chandler v. United States,* 687 F. Supp. 1515, 1521 (D.Utah 1988).[6]

---

[6] The Secretary argues that § 7431(c) does not help the Does' case because that section more clearly expresses Congress's intent to allow recovery of statutory damages without proof of statutory damages than does § 522(g)(4)(A). Section 7431(c) provides that

> the defendant shall be liable to the plaintiff in an amount equal to the sum of—
>
> (1) the greater of—
>
> (A) $1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or
>
> (B) the sum of—
>
> (i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus
>
> (ii) in the case of a willful disclosure or disclosure which is the result of gross negligence, punitive damages, plus
>
> (2) the costs of the action.

This section contains exactly the sort of language that the majority regards as adequate to authorize the award of statutory damages without proof of actual damages. *See ante* at 178. The majority fails to recognize, however, that both Congress and the courts apparently regard

Congress passed another provision with language similar to § 552a(g)(4)(A) as part of the Electronic Communications Privacy Act of 1986 (ECPA). Pub. L. No. 99-508, 100 Stat. 1848. The ECPA creates a civil damages remedy for persons aggrieved by knowing or intentional violations of the Act:

> The court may assess as damages in a civil action under this section the sum of the *actual damages suffered by the plaintiff* and any profits made by the violator as a result of the violation, *but in no case shall a person entitled to recover* receive less than the sum of $1,000.

18 U.S.C. § 2707(c) (emphasis added). As with the statutory damages provisions in the tax code and the Privacy Act, it could be argued that the placement of the phrase "person entitled to recover" identifies such a person as one who has suffered actual damages. Yet Congress explained that appropriate remedies under this section include "damages . . . including the sum of actual damages suffered by the plaintiff and any profits made by the violator as the result of the violation . . . with minimum statutory damages of $1,000." S. Rep. No. 99-541, at 43 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3597. And, as with the tax statute and (with a few exceptions) the Privacy Act, this language

---

the language in the new § 7431 as interchangeable with that of its predecessor. Section 7217 was replaced by § 7431 as part of a comprehensive tax reform bill in 1982, *see* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, and the legislative history provides no indication that the new section was meant to change the operation of the statutory damages remedy. Courts have treated the two statutes interchangeably, *see, e.g., Flippo v. United States*, 670 F. Supp. 638, 642 (W.D.N.C. 1987) (using committee report regarding § 7217 to interpret § 7431), and have uniformly interpreted both versions of the statute to award minimum statutory damages without proof of actual damages.

has not led courts to condition the recovery of minimum statutory damages on proof of actual damages. *See, e.g., United Laboratories, Inc. v. Rukin*, 1999 WL 608712, at *5 (N.D.Ill. 1999) (stating that under § 2707(c) a plaintiff is entitled to the greater of actual damages or $1,000 because of "the difficulty in proving actual damages caused by any particular [violation of the Act]."). Indeed, one district court in this circuit has drawn an analogy between the statutory damages provisions in the Privacy Act and the ECPA. *See Dawson v. Leewood Nursing Home, Inc.*, 14 F. Supp. 2d 828, 832 (E.D.Va. 1998) (describing both acts as rewarding plaintiffs with minimum statutory damages when they achieve "symbolic victories" by proving that the defendant violated the statute.).

The statutory damages provisions in the Internal Revenue Code and the ECPA confirm that it is not unusual for Congress to use "entitled to recovery" language to identify those plaintiffs who are entitled to minimum statutory damages. Nor is it unusual for Congress to do so in the very same sentence authorizing recovery of actual damages. What is unusual is the majority's decision to treat this language as conditioning recovery of statutory damages upon proof of actual damages.[7]

---

[7] The majority criticizes my use of the legislative history of the statutory provisions in the Internal Revenue Code and the ECPA to illuminate the meaning of § 552a(g)(4)(A). According to the majority, *see ante* at 178 n.2, our decision in *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 308 n.7 (4th Cir. 2001), indicates that it is "dubious" to rely on Congress's intent in enacting one statute to discover "the intent of another Congress in enacting a separate, unrelated statute." This observation made sense in the context of *Sigmon*, but it has little bite here. In *Sigmon* we rejected an argument that unambiguous language in one provision of the Coal Act should be interpreted in a manner consistent with our earlier interpretation of a differently worded provision in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

In sum, the case for my reading of the phrase "person entitled to recovery" is a simple one. First, the ordinary meaning of the word "recovery" suggests that any person to whom the United States shall be liable in specified amounts is a person entitled to recovery. Second, Congress and other courts have indicated that they understand the language of this statute and others like it to mean exactly what I believe it means.

2.

The majority offers four reasons for its contrary view that a person entitled to recovery must be one who has sustained actual damages. First, it argues that as a matter of statutory interpretation and grammar, only a person who has

---

Compare 26 U.S.C. § 9701(c)(2)(A) (a provision of the Coal Act at issue in *Sigmon*) *with* 42 U.S.C. § 9601 (a provision of CERCLA at issue in *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992)). Here, the language of the Privacy Act's statutory damages provision is strikingly similar to that of the analogous provisions in the tax code and the ECPA. Consequently, we ought, if at all possible, to give the language of all three statutes a consistent interpretation. *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment) (stating that a statute should be interpreted in a manner "most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind"). This means that the statutory damages provisions in the tax code and the ECPA—including their legislative history—have significant implications for our interpretation of the Privacy Act. The point is especially clear in the case of 26 U.S.C. § 7217(c), the original statutory damages provision in the tax code. If, as the majority claims, Congress had really intended to require proof of actual damages as a prerequisite to the recovery of statutory damages in § 552a(g)(4)(A), I find it difficult to believe that Congress would have chosen to use essentially the same language only two years later in the tax code to authorize the recovery of statutory damages *without* proof of actual damages.

sustained actual damages can be a "person entitled to recovery" because the phrase appears in the same sentence and subparagraph that authorizes the recovery of actual damages. Second, the majority argues that the separation of the two clauses in subsection (g)(4)(A) by the conjunction "but" "reinforce[s] the conclusion that the second clause ('in no case shall a person entitled to recovery receive less than the sum of $1,000') adds a qualification with respect to the class of plaintiffs defined by the first (those who have suffered actual damages)—namely, that in no event shall such a person recover less than $1,000." *Ante* at 178. Third, the majority suggests that it would be odd for Congress to limit the liability of the United States to actual damages and then in the same sentence authorize recovery in the complete absence of actual damages. Finally, the majority suggests that Congress's failure to clearly authorize the award of statutory damages without proof of actual damages when it could easily have done so underscores the correctness of the majority's interpretation. I find none of these reasons convincing.

The majority's first argument turns on the placement of the phrase "person entitled to recovery." Although the majority is aware that the word "recovery" would normally include more than actual damages, it contends that the ordinary meaning of the word must give way because the statute implicitly redefines "recovery" to mean "actual damages" simply by placing the word "recovery" in the same sentence and subparagraph that authorizes an award of "actual damages sustained."[8] According to the majority,

---

[8] The majority's characterization of subparagraph (A) as having the "sole and entire purpose" of "limit[ing] the liability of the United States to actual damages sustained," *ante* at 177, is simply a case of oversell. The subparagraph's purpose is more neutrally described as specifying the amount of damages to be recovered by a plaintiff to whom the

this placement establishes as a matter of statutory interpretation and grammar that a person entitled to recovery must be one who has sustained actual damages. The majority ought to find this claim puzzling. I would think it highly unusual for Congress to narrow the meaning of ordinary words simply through syntax. If Congress intended for "recovery" to mean "actual damages," why didn't it just say "actual damages" instead of using a word with a different (and broader) meaning and then implicitly redefining it through its placement in subparagraph (A)? Such a procedure is hardly "simple" or "straightforward." *Ante* at 178. In any event, the majority's argument fails because its intuitions about the effect of placing the phrases "actual damages sustained" and "person entitled to recovery" in the same subparagraph do not seem to be shared by other courts or by Congress. If the majority's argument worked in this case, it would be equally effective when applied to the analogous statutory damages provisions in the tax code and the ECPA. Yet, as I have just pointed out, courts have repeatedly read the language of these statutes to allow the recovery of statutory damages without proof of actual damages. More powerfully still, Congress indicated in legislative history that it intended for the very similar language in those statutes to allow recovery of statutory damages without proof of actual damages. It is unsurprising, then, that most courts have taken it for granted that § 552a(g)(4) permits the recovery of statutory damages without proof of actual damages.

United States is liable. Further, the "sole and entire purpose" of the subparagraph cannot be to limit recovery to actual damages sustained because the statutory minimum means that some plaintiffs will recover more than their actual damages. That is the whole point of the statutory minimum.

The majority's second argument, which is based on the use of the conjunction "but" to connect the two clauses of subparagraph (A), fares no better. For a start, it has the same difficulty as the first argument because neither courts nor Congress appear to recognize the rule of grammar proposed by the majority. Again, the statutory damages provisions in both the tax code and the ECPA contain the same language relied upon by the majority, yet courts have read those provisions—with Congress's blessing—to authorize the recovery of minimum statutory damages without proof of actual damages. Further, I am unconvinced that the use of the conjunction "but" must mean that the second clause in subparagraph (A) refers to the same class of persons identified in the first clause, namely, individuals who have sustained actual damages. If that had been Congress's intent, it would likely have used the same language in both clauses by saying, "but in no case shall an individual who has sustained actual damages receive less than the sum of $1,000." Instead, Congress used the phrase "person entitled to recovery" and began the clause containing that phrase with the words "but in no case." This suggests discontinuity between the two clauses. The explanation of the discontinuity is that Congress meant to signal that the phrase "person entitled to recovery" is intended to refer not to an individual who has sustained actual damages, but to anyone to whom the United States "shall be liable" in specified amounts.

The majority's third argument is that it makes no sense to believe that Congress would limit recovery to actual damages in subparagraph (A) and then, in the very same sentence, authorize the award of $1,000 to plaintiffs who have proven no actual damages at all. I have two responses to this argument. First, my reading of the statute does not, of course, authorize the award of statutory damages to a

plaintiff totally unharmed by an agency's violation of the Privacy Act. A plaintiff must still satisfy the adverse effect requirement. Second, it is not unprecedented for Congress to provide for an award of statutory damages in the absence of provable actual damages. As I have already explained, Congress did exactly that when it created a civil remedy for unauthorized disclosure of tax return information "[b]ecause of the difficulty in establishing in monetary terms the damages sustained" as a result of such disclosures. S. Rep. No. 94-938, at 348. The same rationale explains why Congress would create a statutory damages remedy in the Privacy Act for those failing to prove actual damages. Indeed, the prevalence of my interpretation of § 552a(g)(4) in the courts partly reflects the fact that the remedy of minimum statutory damages is a fairly common feature of federal legislation. *See* 26 U.S.C. 7217(c) (Supp. 1981) (current version at 26 U.S.C. § 7431(c)) (providing minimum statutory damages for unlawful disclosures of tax return information); 18 U.S.C. § 2707(c) (providing minimum statutory damages for violations of the ECPA); 15 U.S.C. § 1640(a) (providing minimum statutory damages remedy for violations of the Truth in Lending Act). In contrast, I am not aware of any statute in which Congress has "provide[d] for a 'statutory minimum' to actual damages." *Ante* at 177.

The majority also offers a fourth reason in support of its interpretation of § 552a(g)(4)(A), though it does not regard the argument as necessary to its conclusion. According to the majority, my reading of the statute is unpersuasive because if Congress had intended to allow recovery of statutory damages without proof of actual damages, it could easily have written that the United States shall be liable "in an amount equal to the sum of (A) whichever is greater: actual damages sustained by the individual as a result of the

refusal or failure, or $1,000." *Ante* at 178. It is equally true, however, that if Congress had intended to condition the recovery of statutory damages on proof of actual damages, it could have easily drafted subparagraph (A) to say that "in no case shall an individual who has sustained actual damages receive less than the sum of $1,000." In short, the majority's fourth argument simply underlines the point that show that Congress intended to condition the recovery of minimum statutory damages upon proof of actual damages.

To sum up, I believe that on balance the better reading of the statute is that any person to whom the United States shall be liable for its intentional or willful violations of the Privacy Act is a person entitled to recovery. Even if the majority is correct that the use of "person entitled to recovery" to mean any person to whom the United States shall be liable is poor statutory draftsmanship, Congress signaled in the legislative history of the statutory damages provisions in the tax code and the ECPA that it thinks otherwise. It is not our place to say that language Congress has repeatedly used to authorize the recovery of statutory damages without proof of actual damages is inadequate to that task.[9]

3.

Like the majority, however, I must acknowledge that my reading of the statute is not inevitable. This brings me to the majority's fall-back position. It argues that, at worst, the statute is ambiguous and that its interpretation should prevail by virtue of the principle that waivers of the federal government's sovereign immunity must be narrowly

[9] I would quickly add that, as I noted above, Congress is at least as guilty of poor draftsmanship on the majority's reading of the statute as it is on mine.

construed, a principle I will refer to as the "sovereign immunity canon." This argument raises several potentially complicated questions. First, I have some doubts about whether the sovereign immunity canon should even apply in the circumstances of this case.[10] Even conceding that the

[10] The Supreme Court has primarily used the sovereign immunity canon to answer questions about whether a lawsuit may be brought at all or about the availability of certain forms of relief, not to decide what a plaintiff must prove to obtain relief that has been unequivocally authorized. *See, e.g., Lane v. Pena,* 518 U.S. 187, 196-97 (1996) (using canon to decide whether plaintiff could recover monetary damages from the federal government); *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 94-96 (1990) (using canon to decide whether statute of limitations may be equitably tolled in action against the federal government); *Library of Congress v. Shaw,* 478 U.S. 310, 318-21 (1986) (using canon to decide whether plaintiff could recover interest award in action against the federal government). Indeed, the Court recently suggested that when Congress has clearly provided for a damages remedy, some subsidiary questions about the proper administration of that remedy might be properly answered without reference to the sovereign immunity canon. *See West v. Gibson,* 527 U.S. 212, 222 (1999). In short, it is not clear that the Supreme Court intends for the sovereign immunity canon to be used to answer *every* question of statutory interpretation that could affect the federal government's legal liability. Consequently, it is not surprising that most of the courts to interpret § 552a(g)(4)(A) have done so without reference to the sovereign immunity canon. Moreover, it is simply bad law to apply the sovereign immunity canon to questions of statutory interpretation that determine the availability of relief to a particular plaintiff in a particular circumstance. To insist on a clear statement at this level of detail places unrealistic demands on congressional drafting and threatens to frustrate congressional intent. *See* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules,* 1995 Wis. L. Rev. 771, 819-22 (1995). These considerations make me doubt the wisdom of applying the sovereign immunity canon in this case, and I fear that after today's decision it is only a matter of time before the government begins asking us to apply the canon to such questions as whether a particular set of consequences counts as an adverse effect under § 552a(g)(1)(D) or whether a particular manner of releasing personal information counts as an agency disclosure under § 552a(b).

canon applies, I am not sure what it means to say that a statute must be narrowly construed in favor of the sovereign. It is, of course, clear that we must accept the narrower of two equally convincing interpretations; but it is far from clear exactly how much better one interpretation must be before it can prevail over another interpretation. *Cf.* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws,* in *A Matter of Interpretation: Federal Courts and the Law* 28 (Amy Gutmann ed., 1997) (stating that rules that weight the scales of interpretation in favor of a particular result make it "virtually impossible to expect uniformity and objectivity" in statutory interpretation because such rules "add [ ], on one or the other side of the balance, a thumb of indeterminate weight"). I need not explore these questions in any detail, however, because I believe that policy considerations decisively tip the scales in favor of my interpretation. Specifically, the majority's position undermines Congress's purposes in creating a statutory damages remedy as part of the Privacy Act by making that remedy unavailable to many of its intended beneficiaries. For the reasons I explain below, I conclude that my reading must be preferred to the majority's even if the sovereign immunity canon applies.

B.

I noted above that aside from my objections to the majority's textual arguments, I disagree with the majority's apparent assumption that we can sensibly decide whether proof of actual damages is a prerequisite to the recovery of statutory damages without any consideration of what "actual damages" means or what policies led Congress to create a statutory damages remedy as part of the Privacy Act in the first place. In my view, we cannot properly interpret the

statute without identifying the policy consequences of the majority's position and asking whether Congress could have intended these consequences. The consequences of conditioning the recovery of statutory damages upon proof of actual damages vary depending on the meaning of "actual damages." If "actual damages" includes only pecuniary losses, then statutory damages are unavailable to plaintiffs who have suffered only emotional distress even though such distress is the typical injury caused by invasions of privacy. If "actual damages" also includes emotional distress that is both "demonstrable" and "sufficiently articulated" under the standards in *Price v. City of Charlotte*, 93 F.3d 1241, 1254 (4th Cir. 1996), then statutory damages are unavailable to plaintiffs who have suffered minor emotional distress that could support only an award of nominal damages under 42 U.S.C. § 1983.[11] I believe the majority's argument must be wrong because, on either of these interpretations of "actual damages," conditioning the availability of the statutory damages remedy upon proof of actual damages limits the availability of that remedy more sharply than Congress intended. To see why this is so, it is necessary to say more about Congress's reasons for creating a statutory damages remedy as part of the Privacy Act.

Section 552a(g), the civil remedies section of the Privacy Act, protects citizens against government invasions of their

[11] There is a third possibility that I need not discuss in detail. If "actual damages" includes any evidence of emotional distress credited by a trier of fact, statutory damages are unavailable only to a plaintiff who cannot show that he suffered even minor emotional distress as a result of an agency's violation of his privacy. Under this option, any proof of emotional distress sufficient to qualify as an adverse effect will count as actual damages. Thus, this position is indistinguishable in practice from my position that proof of an adverse effect is sufficient to recover statutory damages.

privacy by creating a "self-help enforcement program. . . [designed to] encourage[ ] the filing of lawsuits." *Parks*, 618 F.2d at 685. *See also* Privacy Act § 2(b)(6), 88 Stat. at 1896; S. Rep. No. 93-1183, at 83 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6997 (stating that the civil remedies provision in the Privacy Act was "designed to encourage the widest possible citizen enforcement through the judicial process . . . [which was necessary because] the Act does not give any administrative body authority to ensure compliance with the Act"). To understand why Congress chose to create a statutory damages floor as part of this private enforcement scheme, we need only look to Congress's purpose in enacting similar statutory damages provisions. We explained this purpose in *Scrimgeour v. IRS*, 149 F.3d 318 (4th Cir. 1998):

> [T]he $1,000.00 statutory damage award specified in I.R.C. § 7431(c)(1)(A) is included for the benefit of taxpayers. Actual damages for the invasion of privacy that occurs when tax returns are wrongfully disclosed can be hard to quantify. In order to encourage taxpayers to act as "private attorneys general" and pursue suits against the IRS for violations of I.R.C. § 6103, Congress enacted the statutory damages provision to ensure that in meritorious cases of wrongful release a taxpayer would not walk away from the courthouse empty handed for failure of proving actual damages.

Id. at 327 n.11. *See also supra* at 190, 192 (citing the legislative history of the statutory damages provisions in the Internal Revenue Code and the ECPA). In short, Congress creates statutory damages remedies because it wants to encourage civil enforcement suits in situations where actual

damages are difficult to prove.[12] As we observed in *Scrimgeour*, the danger that plaintiffs with meritorious cases will "walk away from the courthouse empty handed" is especially great when the wrong to be remedied is the invasion of privacy because damages arising from that wrong can be hard to quantify. This is because the typical injury caused by invasions of privacy is mental distress. *See Time, Inc. v. Hill*, 385 U.S. 374, 384-85 n.9 (1967); *Johnson*, 700 F.2d at 977. If these are the reasons why Congress created the statutory damages remedy in § 552a(g)(4)(A), it is difficult to understand why Congress would have conditioned the availability of that remedy on the plaintiff's ability to prove either economic harm or the kind of emotional harm that could support a substantial emotional damages award under the standards articulated in *Price v. City of Charlotte*.

The implausibility of the majority's interpretation of the Privacy Act is especially clear if the term "actual damages" includes only pecuniary harms. Even the Secretary acknowledges that Congress created a self-help enforcement scheme to protect citizens against government invasions of privacy and that Congress included a statutory damages remedy within that scheme to ensure that citizens with little or no provable damages would have an incentive to sue. Because mental or emotional distress is the typical injury

[12] Because the legislative history of the Privacy Act contains no explicit discussion of Congress's decision to include a statutory damages remedy in § 552a(g)(4), *see Johnson*, 700 F.2d at 981 n.25, I am admittedly assuming that Congress's purpose here was the same as its purpose in creating similar statutory damages remedies. Because the statutory damages provisions in the Privacy Act and the tax code both aim at the same harm—the invasion of privacy caused by government disclosures of personal information—I believe this assumption is warranted.

caused by invasions of privacy, it makes no sense to believe that Congress would undercut the force of its statutory damages remedy by refusing to make statutory damages available to citizens who suffered only emotional injuries. I conclude that if actual damages under the Act are limited to out-of-pocket losses, the majority's claim that proof of actual damages is a prerequisite to the recovery of statutory damages must be wrong.[13]

Though the question is closer, I also believe that the majority's reading of the Act is untenable even if "actual damages" includes emotional distress sufficient to satisfy the standards in *Price v. City of Charlotte*. According to the majority, a plaintiff's "conclusory" testimony about his emotional distress, even if believed by the trier of fact, is not sufficient to recover statutory damages. The plaintiff's testimony must establish that he "suffered demonstrable emotional distress, which must be sufficiently articulated." *Price*, 93 F.3d at 1254.

I appreciate the need for the sort of inquiry *Price* demands in assessing substantial damages awards based solely on the plaintiff's own testimony regarding his emotional distress. In the context of the Privacy Act, I have no difficulty with the claim that a person who seeks to recover emotional distress damages in excess of the $1,000

[13] Like the majority, I need not reach the difficult question of the meaning of "actual damages," a question that has been extensively analyzed by the Fifth and Eleventh Circuits. *See Johnson*, 700 F.2d at 974-86; *Fitzpatrick*, 665 F.2d at 329-31. I simply point out that if the Secretary is correct in her contention that "actual damages" includes only out-of-pocket losses, proof of actual damages cannot be a prerequisite to the recovery of statutory damages. Conversely, I believe that the majority's holding commits this circuit to the position that the term "actual damages" includes at least emotional distress that would qualify as "demonstrable" under *Price*.

statutory minimum should be required to bring forward the sort of proof that *Price* demands. A reviewing court must be able to satisfy itself both that some actual injury has occurred and that the jury has not simply been left to speculate about the proper amount of damages. In addition, the legislative history of the Privacy Act suggests that Congress worried about the possibility that juries would simply pull damages numbers out of the air based not on the actual harms suffered by the plaintiff, but on the jury's judgment about the gravity of the government's violation of the Privacy Act. *See Johnson,* 700 F.2d at 983-85 (suggesting that Congress used the term "actual damages" in the Privacy Act to emphasize that a plaintiff could not recover presumed damages based simply on the fact that his privacy had been invaded). This worry is appropriately addressed by the *Price* framework.[14]

It is an altogether different matter, however, to make the *Price* framework the standard for deciding when a Privacy Act plaintiff may recover minimum statutory damages. The problem with this approach is that, even on the most restrictive reading, the statute plainly awards $1,000 in statutory damages to a plaintiff who can prove $1, or even one penny, of actual damages. The *Price* framework was simply not designed to help courts decide whether a plaintiff's testimony adequately supports damages awards

[14] In many jurisdictions plaintiffs may recover presumed damages (substantial damages awards without proof of actual pecuniary or emotional harm) for dignitary torts such as the invasion of privacy. *See* 2 Dan B. Dobbs, *Law of Remedies* § 7.1 (2d ed. 1993). Dobbs suggests that § 552a(g)(4)(A) of the Privacy Act can best be understood as the statutory equivalent of presumed damages. *Id.* at § 7.3(4). In other words, the suggestion is that Congress wished to incorporate some of the force of the common law doctrine of presumed damages for dignitary torts while placing limits on jury discretion.

for such small sums. Consider the various factors that *Price* regards as adequate corroboration of emotional distress: "medical, psychological, or psychiatric treatment, the presence of physical symptoms, loss of income, and impact on the plaintiff's conduct and lifestyle." *Ante* at 182. I think it highly unlikely that any plaintiff would seek medical, psychological, or psychiatric treatment, lose income, or undergo a change of lifestyle because of one dollar's worth of emotional distress. Physical symptoms (sleeplessness, for example) might be present even in very minor cases of emotional distress, but then again they might not. All these factors are of course relevant to deciding whether a plaintiff experienced significant emotional distress—the kind that could support a substantial compensatory damages award. But they have little to say about whether claims of very minor emotional distress are genuine, and the majority agrees that if emotional distress counts as "actual damages" at all, proof of very minor emotional distress entitles the plaintiff to statutory damages under the Privacy Act. *See ante* at 177 (stating that statutory damages are available under the Act "where actual damages are greater than $0 but less than $1,000"). The *Price* framework is unhelpful in evaluating claims of very minor emotional distress for a simple reason: no plaintiff in a lawsuit under § 1983 (or any other cause of action without a statutory damages provision) ever sets out to prove that he suffered one dollar's worth, let alone one penny's worth, of emotional distress. When a plaintiff winds up with nominal damages, this means either that he conceded the absence of actual injury and sought to vindicate an abstract right or that he sought substantial damages and lost. A nominal damages award surely does not mean that the plaintiff has tried, but

failed, to prove that he suffered one dollar's worth of emotional distress.[15]

This point is not undercut by the majority's appeal to *Carey v. Piphus,* 435 U.S. 247 (1978). According to the majority, a plaintiff who would be entitled only to nominal damages has sustained no actual damages because nominal damages "are designed to vindicate legal rights 'without proof of actual injury.'" *Ante* at 181 (quoting *Carey,* 435 U.S. at 266 (1978)). The majority accurately states one purpose of awarding nominal damages, but it does not follow that an award of nominal damages signals the complete absence of actual injury. Nominal damages are also awarded "in cases where, although there has been a real injury, the plaintiff's evidence entirely fails to show its amount." *Black's Law Dictionary* 392 (6th ed. 1990). *See also* Restatement (Second) of Torts § 907 cmt. c (1979) ("Nominal damages are properly awarded when, although the claimant shows significant harm, its amount is not

[15] The majority faults me for characterizing the *Price* framework as a tool for reviewing damages awards that exceed "some relatively high threshold of 'substantiality,'" *ante* at 180 n.6, and insists that *Price* is an appropriate framework for determining whether *any* award of more than nominal damages for emotional distress is warranted. I acknowledge that the notion of a "substantial" damages award is somewhat vague, so perhaps some clarification is in order. Any award over the statutory minimum of $1,000 qualifies as "substantial," and perhaps the criteria in *Price* might also be useful in evaluating awards of considerably less than $1,000. (It bears noting, however, that no case of which I am aware has used *Price* to vacate a jury award for emotional distress of less than $1,000.) In contrast, an award of $1.00 in actual damages for emotional distress is not "substantial" on any account. In saying that the *Price* framework is designed to evaluate "substantial" damages awards, my primary point is that *Price* is not helpful in deciding when a plaintiff has suffered the one dollar's worth (or even one penny's worth) of actual damages that should warrant the recovery of statutory damages even on the majority's reading of the Privacy Act.

proved with sufficient certainty to entitle him to an award of compensatory damages."). Here, the fact that Buck Doe would be entitled to only nominal damages in a § 1983 case simply indicates that a jury could not reasonably make a substantial damages award on the basis of his somewhat limited testimony regarding his emotional distress because any attempt to do so would be unduly speculative. It does not mean that he suffered no injury at all.

The problems with the majority's approach are well illustrated by its treatment of Buck Doe's Privacy Act claim. In holding that Buck Doe has produced evidence of adverse effects sufficient to survive summary judgment, the majority acknowledges that a reasonable trier of fact could credit Buck Doe's testimony about his emotional distress and could determine that he really did experience some degree of anxiety about the possibility that others would misuse his social security number. It follows that Buck Doe has presented evidence that he suffered an "injury in fact," *ante* at 181 n.6, and that a reasonable factfinder could conclude that he has established more than a merely technical invasion of his rights. This point makes it very difficult to understand the majority's conclusion that Buck Doe nonetheless failed to present evidence of "actual damages" sufficient to survive summary judgment. The majority appears to hold that even though a reasonable factfinder could conclude that Buck Doe suffered some genuine emotional distress (that he was telling the truth when he claimed that he worried about possible misuse of his social security number), no factfinder could reasonably conclude that this emotional distress warranted even one penny of compensatory damages. I do not see how this position can be correct. In other words, I do not see any room to draw a line between proof of emotional distress sufficient to constitute an adverse effect and proof of emotional distress

sufficient to establish a penny's worth of actual damages. Certainly *Price* cannot help courts to make this sort of distinction. As a result, I conclude that the majority's adoption of *Price* as the measure of when a plaintiff's emotional distress proves "actual damages" simply raises the bar for recovering statutory damages higher than Congress meant to put it by placing that remedy beyond the reach of plaintiffs who suffer very minor emotional harms.

In responding to the foregoing argument, the majority appears to acknowledge, even to embrace, this consequence of its position. It suggests that the denial of statutory damages to plaintiffs who have suffered only emotional injuries that are "very minor" or not "meaningful," *ante* at 181 n.6, is simply the price of the actual damages requirement's "gatekeeping function of avoiding tremendous over-compensation of plaintiffs," *id.* In response, my first point is that I do not see how the idea that a plaintiff must prove "meaningful" or more than "very minor" emotional distress can be squared with the majority's recognition that, even on its own reading of the Act, proof of any amount of actual damages greater than zero is enough to trigger the statutory damages remedy. *See ante* at 177. Few would describe emotional harms warranting one dollar's worth of compensatory damages as "meaningful," yet such harms would be sufficient to merit statutory damages under § 552a(g)(4)(A) even if the majority was correct that proof of actual damages is a prerequisite to the recovery of statutory damages. Second, I think that any purpose Congress might have had of avoiding "tremendous overcompensation" of plaintiffs is adequately served by requiring plaintiffs to prove they have suffered an adverse effect as a result of the government's invasion of their privacy. *Cf. Fitzpatrick*, 665 F.2d at 330 (explaining that the $1,000 minimum damages floor is meant to "avoid a

situation in which persons suffering injury had no provable damages and hence no incentive to sue" (emphasis added)).

The majority has a further rejoinder to these points, however. It argues that because the "'actual damages' requirement" is both distinct from and more demanding than the adverse effect requirement, very minor emotional harms sufficient to count as adverse effects must be insufficient to count as actual damages. *Ante* at 180-81 n.6. I agree with the majority that a convincing interpretation of the statute must explain why Congress chose to use two terms, "adverse effect" and "actual damages," when it could have used one. I also agree that if the term "actual damages" includes emotional distress, the showing of emotional distress necessary to satisfy any actual damages requirement imposed by the Privacy Act would have to be greater than the showing necessary to satisfy the adverse effect requirement. To my mind, however, these points cut the other way and simply reinforce my argument that the Privacy Act does not contain an actual damages requirement at all. Rather, it awards minimum statutory damages upon proof of an adverse effect suffered as a result of an agency's willful or intentional violation of the Privacy Act. In addition, it creates an actual damages remedy by allowing recovery of proven actual damages in excess of the $1,000 statutory minimum. On my reading, then, the showing needed to recover proven actual damages for emotional distress is of course greater than that needed to satisfy the adverse effect requirement.[16]

---

[16] There is, of course, another way to explain why Congress chose to use the term "adverse effect" as well as the term "actual damages." The Act could be read to say that emotional distress is an adverse effect, that proof of an adverse effect is sufficient to recover statutory damages, and that "actual damages" includes only pecuniary harms. On this reading, plaintiffs who suffer only emotional distress as a result of willful and

To put the point in another way, the majority cannot produce a satisfying interpretation of the Act by claiming both that the Privacy Act imposes an actual damages requirement and that the term "actual damages" can include emotional distress. If even very minor emotional distress counts as "actual damages," there seems to be no distinction between the adverse effect requirement and the actual damages requirement. As the majority points out, this result seems wrong because it fails to explain why Congress created two requirements rather than one. The majority avoids this problem by holding that only emotional distress satisfying the *Price* criteria counts as actual damages. This creates a gap between the adverse effect requirement and the actual damages requirement, but it does so only by making the statutory damages remedy unavailable to plaintiffs who have suffered very minor emotional harms. I do not think this result can be squared with Congress's intent in creating the statutory damages remedy, for the text of the Privacy Act indicates that if Congress created an actual damages requirement at all, that requirement should be satisfiable by proof of one dollar's worth (or even one penny's worth) of actual damages. The better course is simply to abandon the idea that proof of actual damages is a prerequisite to the recovery of statutory damages.

In sum, the majority's claim that proof of actual damages is a prerequisite to the recovery of statutory damages is inconsistent with Congress's intent in creating a statutory damages remedy for agency violations of citizens' privacy, and this is so regardless of whether the term "actual

---

intentional violations of the Privacy Act recover $1,000—no more and no less—while plaintiffs who can prove pecuniary harms in excess of $1,000 recover the full amount of these "actual damages." This seems to be the reading adopted by the Eleventh Circuit in *Fitzpatrick*.

damages" is limited to out-of-pocket losses or includes emotional distress. This conclusion follows from three basic points about the Privacy Act. First, Congress created the statutory damages remedy as an incentive to suit because it recognized that damages from government invasions of privacy are hard to prove. Second, Congress recognized that the typical injury caused by the invasion of privacy is emotional distress. Third, Congress intended for the statutory damages remedy to be available to plaintiffs who suffered even very minor harms as a result of the government's intentional or willful invasion of their privacy. If these three points are accepted, as I think they must be, Congress could not have intended to condition the recovery of statutory damages upon proof of actual damages. The point is especially clear if "actual damages" means out- of-pocket losses, for it would be senseless for Congress to create a statutory damages remedy in order to encourage citizen enforcement of the Privacy Act and then condition the availability of that remedy upon proof of economic losses when the typical injury caused by invasions of privacy is emotional distress. Though the question is closer, I think the claim that proof of "demonstrable" emotional distress under *Price* is needed to recover statutory damages is also untenable. The problem with this claim is that the *Price* framework is intended to help courts decide when a plaintiff has suffered the kind of emotional distress that can support a substantial damages award. When that framework is used to decide whether a plaintiff is entitled to statutory damages, the inevitable result is that plaintiffs who suffer very minor harms will go uncompensated. This cannot have been Congress's intent, for if Congress had intended to impose an actual damages requirement at all, the text of § 552a(g)(4)(A) indicates that any amount of actual damages would be sufficient to trigger the statutory damages remedy.

Accordingly, I would hold that proof of actual damages is not a prerequisite for the recovery of statutory damages under § 552a(g)(4)(A). A plaintiff who proves that he has suffered an adverse effect as a result of an agency's willful or intentional violation of the Act is entitled to the statutory damages remedy. A plaintiff may, of course, recover any proven actual damages in excess of $1,000.

III.

In conclusion, I respectfully dissent from the majority's holding in part II of its opinion that actual damages are a prerequisite for the recovery of statutory damages under the Privacy Act and from its consequent decision to grant summary judgment to the Secretary against Buck Doe. I concur in the majority's affirmance of the entry of summary judgment against the other Doe plaintiffs because they failed to show they had suffered any adverse effects as a result of the Department of Labor's wrongful disclosure of their social security numbers. Finally, I would order a remand for a trial in Buck Doe's case.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

ROBERT DOE, a/k/a VIRGINIA PRIVACY LITIGATION, et al.,	)	
Plaintiffs,	)	CIVIL ACTION NO. 2: 97CV00043
v.	)	
ALEXIS M. HERMAN SECRETARY OF LABOR,	)	FINAL ORDER
Defendant.	)	

This case was referred pursuant to 28 U.S.C. § 636(b)(1)(B) to the Honorable Pamela Meade Sargent, United States Magistrate Judge. The Magistrate Judge filed a report, dated May 24, 2000, recommending that the Plaintiffs' Motion to Amend Complaint and File Affidavits in Support of Damages be denied. The Plaintiffs subsequently filed objections to the report and recommendation, and the court, upon a *de novo* review of the record, is of the opinion that the report should be adopted.

The Magistrate Judge also filed a report dated October 29, 2000 recommending that the Plaintiffs' Motion to Certify Class Action and Motion for Summary Judgment be denied and the Defendant's Motion for Summary Judgment be granted as to each named Plaintiff except Buck Doe. Both sides filed objections to this report and recommendation, and the court, upon a *de novo* review of the record, is of the opinion that this report should be adopted in part and reversed in part. This court sustains the

recommendation to deny the Plaintiffs' Motion to Certify Class Action and Motion for Summary Judgment for all named Plaintiffs, except Buck Doe. Thus, this court reverses the report in part by granting Buck Doe's Motion for Summary Judgment. The court also sustains the report's recommendation to grant the Defendant's Motion for Summary Judgment against every named Plaintiff except Buck Doe.

FACTS AND PROCEDURAL HISTORY

Plaintiff Robert Doe, et al., ("Plaintiffs") have filed these consolidated actions against the Defendant, the Secretary of the United States Department of Labor ("Department").[1] The Plaintiffs assert that the Department frequently violated the Privacy Act, 5 U.S.C. § 552a (1994), by collecting and disseminating their social security numbers and other personal information to a multitude of non-governmental parties while in the process of administering the Federal Black Lung Benefits Act of 1981, 30 U.S.C. § 901 *et seq.* (1994). The matters currently before this court are the Plaintiffs' Motion to Certify Class Action, (Docket Item No. 23), cross motions for summary judgment, (Docket Items Nos. 11, 21), and the Plaintiffs' Motion to Amend Complaint and File Affidavits in Support of Damages, (Docket Item No. 90).

The Plaintiffs, all black lung claimants, assert that they were required to complete a Department form entitled "Miner's Claim for Benefits Under the Black Lung Benefits Act," which compelled them to place their social security

[1] For a thorough discussion of the factual posture and applicable law in this case refer to the reports and recommendations submitted by United States Magistrate Judge Pamela Meade Sargent dated October 29, 1999 and May 24, 2000.

numbers on the form. It appears from the record, that the Office of Workers' Compensation Program of the Department of Labor, utilizes the social security numbers for identification purposes. The Plaintiffs also allege that the Department disseminated their social security numbers via multi-captioned hearing notices which typically listed twenty black lung claimants per notice, and were distributed to other claimants, coal companies, insurance companies and other attorneys. Additionally, the Plaintiffs assert that the Department also uses the claimants' social security numbers on black lung decisions that are subsequently reported in various services.

The Department does not dispute the use of the social security numbers, but contends that the use of such numbers does not violate the Privacy Act. However, the Department has agreed to stop using the claimants' social security numbers on multi-captioned black lung hearing notices and to stop mailing these notices with the social security numbers.

The crux of the issue at hand is whether the Plaintiffs provided evidence of damages caused by the alleged injurious acts committed by the Department, namely disseminating social security numbers to parties unrelated to a particular black lung case. The record indicates that the original and amended complaints were not sworn by the Plaintiffs, and failed to indicate what damages the Plaintiffs actually suffered. In particular, the Amended Complaint does not allege any out-of-pocket expenses or emotional distress due to the publication of the Plaintiffs' social security numbers.

Although the Plaintiffs Robert Doe, Buck Doe, R.A. Doe, and Dallas Doe testified at a hearing on May 6, 1998, regarding the Department's use of their social security

numbers, they failed to mention or claim any financial loss or out-of-pocket expense related to such use of their social security numbers. Robert Doe did testify that he was "concerned" about the Department's public use of his social security number (Docket Item No. 64, p. 30, lines 1-8), but that "nothing bad happened to me but I guessed it could." (Docket Item No. 64, p. 25, lines 11-14.) R.A. Doe initially testified that the dissemination of his social security number concerned him, but on cross-examination stated that it really did not bother him. (Docket Item No. 75, p. 75, lines 8.) Conversely, Dallas Doe testified that because of the dissemination of his social security number he was forced to seek medical treatment, however, he failed to present any evidence supporting his alleged medical or psychological condition or the cause thereof. Buck Doe was the sole plaintiff to file an affidavit with the court stating that he suffered emotional distress from the Department's public disclosures of his social security number. (Affidavit of Buck Doe, Docket Item No. 14.) Thus, Buck Doe was only plaintiff to provide evidence of damages and causation sufficient enough to create a genuine issue of material fact.

The Department moved for summary judgment on November 24, 1997 in part because the plaintiffs failed to produce any evidence that they suffered actual damages. Absent from the Plaintiffs' response was any mention of or request for additional discovery or proof of damages. The plaintiffs also failed to present this issue before the Magistrate Judge in a hearing held on April 22, 1999. As a result, the Magistrate Judge issued the October 29, 1999 report recommending that the Defendant's Motion for Summary Judgment be granted against all plaintiffs, except Buck Doe, on the basis that they failed to produce any evidence showing actual damages. Subsequent to the October 29, 1999 report, the Plaintiffs filed a Motion to

Amend Complaint and File Affidavits in Support of Damages, which is addressed by the May 24, 2000 report and recommendation.

SUMMARY JUDGMENT STANDARD

This court will grant summary judgment only when "the pleading, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A court must view all evidence and factual inferences in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, even "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* at 247-248.

FINAL DETERMINATION

The first issue before this court concerns the lingering question of whether this case should be certified as a class action. The court adopts the finding in the October 29, 1999 report and recommendation that a class action certification is not appropriate in this case, because the Plaintiffs' individual claims are not typical of all class members as is required by Federal Rule of Civil Procedure 23(a). Therefore, the Plaintiffs' Motion to Certify Class Action is hereby DENIED.

The second and more recent issue to arise in this case involves the Plaintiffs' Motion to Amend Complaint and File Affidavits in Support of Damages. As both parties are fully aware, this case has been in existence for a number of years and has involved a host of extensive hearings and a

multitude of motions. It was only after the Magistrate Judge recommended granting the Department's Motion for Summary Judgment did the Plaintiffs suddenly want to amend their Complaint and provide evidence of damages. Unfortunately the ship has already sailed for the plaintiffs; it is now too late for the Plaintiffs to amend their complaint and to provide evidence of alleged damages. The plaintiffs were on notice and had ample opportunity to remedy their damages dilemma as it pertained to the Defendant's Motion for Summary Judgment, but they failed to do so. It is accordingly ADJUDGED and ORDERED that the Plaintiffs' Motion to Amend Complaint and File Affidavits in Support of Damages is hereby DENIED.

Thirdly, as per the October 29, 1999 report and recommendation, this court finds that the plaintiff Buck Doe has proven the four elements essential to prevail on a claim for damages under the Privacy Act.[2] Furthermore, this court finds sufficient incontrovertible evidence supporting Buck Doe's assertion that he suffered "actual damages," in the form of emotional distress as a result of the Department disclosing his social security number to parties not specifically involved in his black lung claim. Accordingly, the October 29, 1999 report and recommendation is sustained in part, as it relates to Buck Doe proving the four

[2] In order for a claimant to succeed in a Privacy Act claim he or she must prove the following four elements: (1) the information at issue is covered by the Privacy Act as a "record" contained in a "system of records;" (2) the agency "disclosed" the information; (3) the disclosure had an "adverse effect" on the Plaintiffs; and (4) the disclosure was willful and intentional. *See Quinn v. Stone*, 978 F.2d 126, 131 (3d Cir. 1992); *see also Rose v. United States*, 905 F.2d 1257, 1259 (9th Cir. 1990). Pursuant to 5 U.S.C. § 552a(g)(4)(A) (1994), a claimant who proves the aforementioned elements may recover an amount equal to "actual damages."

essential elements to a Privacy Act case, and reversed in part, in that Buck Doe provided sufficient evidence of actual damages that not only allowed him to survive the Department's summary judgment motion, but also allows granting summary judgment in his favor. Thus, Buck Doe's Motion for Summary Judgment is hereby GRANTED.

Finally, this court adopts the remaining findings, recommendations, and conclusions found in the report and recommendations dated October 29, 1999 and May 24, 2000.

It is hereby ADJUDGED and ORDERED that (1) the claimant, Buck Doe, be awarded the statutory minimum amount of $1,000 dollars, provided by 5 U.S.C. § 552a(g)(4)(A) (1994); and (2) as a result of the Plaintiffs receiving preliminary injunctive relief,[3] the court awards attorney's fees. The Plaintiffs' Counsel must submit a petition for attorney's fees with this court within twenty (20) days of receipt of this Order.

Pursuant to the above-mentioned judgments by the court, this case shall be stricken from the docket.

[3] The preliminary injunction required the Department to cease using the claimants' social security numbers on multi-captioned black lung hearing notices, to discontinue the practice of mailing multi-captioned black lung hearing notices which disclose the claimants' social security numbers, and to generally obey the provisions of the Privacy Act.

The Clerk is directed to send certified copies of this Order to all counsel of record.

ENTER: This 24th day of July, 2000

/s/
SENIOR UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF VIRGINIA,
BIG STONE GAP DIVISION.

Robert DOE, a/k/a Virginia Privacy Litigation, et al.,
Plaintiffs
v.
Alexis M. HERMAN,
Secretary of the Department of Labor[1],
Defendant

No. CIV. A. 297CV00043.

Oct. 29, 1999.

Report and Recommendation By: Pamela Meade Sargent United States Magistrate Judge.

SARGENT, Magistrate J.

I. Introduction

Plaintiff, Robert Doe, a pseudonym, and others, ("the Plaintiffs"), have filed these consolidated actions against the Secretary of the United States Department of Labor, ("the Department"). Plaintiffs allege that the Department has committed numerous violations of the Privacy Act, 5 U.S.C.A. § 552a (West 1996 & Supp. 1999), in its administration of the Federal Black Lung Benefits Act of 1981, 30 U.S.C.A. § 901 *et seq.* (West 1986 & Supp. 1999). Currently pending before the court are Plaintiffs' Motion To Certify Class Action, (Docket Item No. 23), and cross motions for summary judgment filed by the Plaintiffs and

[1] Alexis M. Herman became Secretary of the Department of Labor on May 9, 1997. Pursuant to FED. R. CIV. P. 25(d)(1), Alexis M. Herman is substituted for Acting Secretary, Cynthia A. Metzler, as the defendant in this suit.

the Department, (Docket Item Nos. 11 and 21). The jurisdiction of this court is based on 5 U.S.C.A. § 552a(g)(1) and 28 U.S.C.A. § 1331. These motions are before the undersigned magistrate judge by referral pursuant to 28 U.S.C.A. § 636(b)(1)(B).

II. Factual Background

The facts underlying this litigation are largely uncontested. Plaintiffs, all claimants for federal black lung benefits, initiated this litigation by filing seven separate complaints, seeking damages and temporary and permanent injunctions, on or about February 13, 1997.[2] In these complaints, the Plaintiffs allege that part of the appeals process for receipt of federal black lung benefits requires the completion of a Department of Labor form entitled "Miner's Claim For Benefits Under The Black Lung Benefits Act," ("the Claim Form"). (Exhibit 1, Defendant's Cross Motion for Summary Judgment, Docket Item No. 21.) Question No. 2 of the four-page Claim Form requests the miner's social security number. The Office of Workers' Compensation Program of the Department of Labor, which

[2] These seven actions were consolidated by order entered June 4, 1997, (Docket Item No. 8). By order entered August 4, 1997, (Docket Item No. 13), the court allowed an eighth named plaintiff to intervene in these cases. The eight named plaintiffs are referred to by the following pseudonyms: Robert Doe, (2:97CV00043); Tays Doe, (2:97CV00043); Charles Doe, (2:97CV00053); Joe Doe, (2:97CV00054); Thomas Doe, (2:97CV00055); Buck Doe, (2:97CV00056); Dick Doe, (2:97CV00057); and Otis Doe, (2:97CV00058). There are currently pending before the court three other motions to intervene which were filed on behalf of another 16 black lung claimants. (Docket Item Nos. 17, 20 and 81.) The pseudonyms being used by the court to refer to these individuals are Leon Doe, W.S. Doe, Cleveland Doe, Clint Doe, Alex Doe, Will Doe, Lula Doe, Isaac Doe, Rafe Doe, Jessie Doe, Harvie Doe, Ross Doe, S.R. Doe, F. Doe, R.A. Doe and Dallas Doe. The court has not ruled on these motions to intervene.

administers the federal black lung benefits program, utilizes this social security number for identification purposes. In particular, the Department uses these social security numbers as "OWCP" numbers to identify each claim. (Declaration of Miriam Miller, Exhibit 2, Defendant's Cross Motion for Summary Judgment, Docket Item No. 21; Stipulation, Docket Item No. 6.)

The Plaintiffs also allege that the Department distributed these social security numbers on a widespread basis to many uninterested parties. Plaintiffs object specifically to the Department's use of multi-captioned hearing notices. These notices contained the names and social security numbers of approximately 20 black lung claimants whose hearings would occur before an administrative law judge on a particular date.[3] The notices are then distributed to each of the claimants listed on the notice, and their attorneys, as well as all of the coal companies and insurance companies that are involved in each of the cases listed on the notice. Thus, many parties who have no stake in a particular claim are apprized of a claimant's social security number.

The Plaintiffs also maintain that, as a result of the Department's indiscriminate use of social security numbers, some of the black lung decisions reported by various services include claimants' social security numbers. These reports are available in public libraries and on various online legal research services. In addition, decisions containing claimants' social security numbers also are

[3] Examples of these notices can be found in the record. (Exhibits A, B1, B2, B3, B4, B5, B6, B7, B8, Motion To Hold Defendant In Contempt Of Court For Violating The Court Order Of February 20, 1997, In Which Defendant Agreed To Abide By The Privacy Act, And For Other Violations Of The Said Order, Docket Item No. 31.)

published in a series of books known as the Benefits Review Board Reporter.[4]

The Department does not dispute that it used the Plaintiffs' social security numbers as alleged, however, the Department asserts that these uses did not violate the Privacy Act. (Exhibit 2, Docket Item No. 21.)

Plaintiffs claim that their names, addresses and social security numbers constitute private information and that disclosure of this information violates 5 U.S.C.A. § 552a, as well as the due process of law and their rights of privacy under the United States Constitution. The Plaintiffs allege that the distribution of this information to complete strangers has had adverse effects on them. They assert that the Department's conduct raises a serious and grave threat to privacy, security, credit ratings, identity and well-being. The Plaintiffs contend that these rights are protected by the Privacy Act, as well as the Constitution of the United States. Plaintiffs seek monetary damages for each violation and temporary and permanent injunctive relief ordering the Department to cease the disclosure and mass publication of the social security numbers of black lung claimants.

After the filing of these actions, the parties entered into a stipulation whereby the Department agreed to stop using the claimants' social security numbers on multi-captioned black lung hearing notices and to discontinue the practice of mailing multi-captioned black lung hearing notices which bear claimants' social security numbers. (Docket Item No. 6, ¶ 1.) The Department further agreed that its employees would obey the provisions of the Privacy Act. The Department stated, in this stipulation, that the agreement

[4] Examples of these published opinions can be found in the record. (Exhibits C1, C2, C3, C4, C5 and C6, Docket Item No. 31.)

was not an admission that it had violated the Privacy Act. Rather, the stipulation served to resolve the issues raised in Plaintiffs' February 13, 1997, motion for temporary and permanent injunctive relief. (Motion For Temporary Injunction, Docket Item No. 2.) This court entered the stipulation as an order on February 20.1997. (Docket Item No. 6.)

On August 4, 1997, the court granted Plaintiffs' motion to amend their complaint, (Docket Item No. 15), and the Plaintiffs filed an Amended Complaint on September 10, 1997. (Amended Complaint, Docket Item No. 19.) This Amended Complaint was substantially similar to the seven original complaints in all respects, except that it also contained allegations averring that the court should certify this litigation as a class action. The Amended Complaint alleges that the court should certify a class consisting of all applicants for black lung benefits through the black lung program operated by the Department. (Docket Item No. 19, ¶ II(2).) None of the seven original complaints or the Amended Complaint were sworn to by the Plaintiffs. The Amended Complaint alleges that the Plaintiffs were adversely affected by the Department's disclosure of their social security numbers, but it does not contain any allegations regarding, what, if any, damages the Plaintiffs have suffered as a result of these disclosures. Specifically, the Amended Complaint does not allege that the Plaintiffs have suffered any out-of-pocket expenses or emotional distress as a result of these disclosures.

On July 30, 1997, Plaintiffs filed their motion for summary judgment. (Plaintiffs' Motion For Summary Judgment, Docket Item No. 11.) The Department responded by filing its own cross motion for summary judgment on November 24, 1997. (Docket Item No. 21.) On December 24, 1997, the Plaintiffs moved the court to certify this

litigation as a class action. (Plaintiffs' Motion To Certify Class Action, Docket Item No. 23.) The parties have provided written arguments to the court. Various exhibits, deposition transcripts and affidavits also have been filed for the court's consideration. At least three separate hearings have been held, at which, several witnesses have testified.

Included among the exhibits filed for the court's consideration is a copy of the Claim Form. (Exhibit 1, Docket Item No. 21.) The first page of the Claim Form contains the following statement:

> IMPORTANT: No benefits may be paid under the Black Lung Benefits Act unless a completed application form has been received. (30 U.S.C. 901, *et seq.)* Completion of this form may represent a claim against an individual coal mine operator. If such operator is involved, a copy of this form will be provided to that operator.

(Exhibit 1, Docket Item No. 21.) Page four of the Claim Form contains the following statement:

> PRIVACY ACT STATEMENT
>
> The following information is provided in accordance with the Privacy Act of 1974.(1) Submission of this report is required under the Black Lung Benefits Act. (2) The information in the report will be used to determine eligibility for and the amount of benefits payable under the Act. (3) The information may be used by other agencies or persons in handling matters relating, directly or indirectly, to the subject matter of the claim, so long as such agencies or persons have received the consent of the individual claimant or beneficiary, or have complied with the provisions of 20 C.F.R. Part 725.(4) Furnishing all requested information will facilitate the claims adjudication process; and the effects of not providing all or any part of the requested information may delay the process, or result in an unfavorable decision or a reduced level of benefits. (Disclosure of your social security number is voluntary; the failure to disclose such number will not result in the denial of any right, benefit or privilege to which an individual may be entitled.)

(Exhibit 1, Docket Item No. 21.)

Two of the named Plaintiffs, Robert Doe and Buck Doe, and two of the individuals who have moved to intervene, R.A. Doe and Dallas Doe, testified at the court's May 6, 1998, hearing on this matter. (Transcript of Hearing on Certification as Class Action, Docket Item No. 64.) None of these men provided any testimony that they had suffered any financial loss or out-of-pocket expense as a result of the Department's disclosure of their social security numbers. Robert Doe testified that he "would rather not have anybody or a lot of people having [his][s]ocial [s]ecurity number. Nothing bad happened to me but I guess it could." (Docket Item No. 64, Page 28, lines 11-14.) Robert Doe stated that he was "concerned" that the Department had disclosed his social security number and home address. (Docket Item No. 64, Page 30, lines 1-8.) Robert Doe also testified that after he was awarded black lung benefits several people called him asking to borrow money. He admitted, however, that he had no knowledge of whether these calls were as a result of the Department's disclosure of his name and social security number. (Docket Item No. 64, Page 37, lines 3-10.)

Buck Doe testified that he thought it was "odd" that the Department sent his social security number out on multi-captioned hearing notices. (Docket Item No. 64, Page 45, lines 19-23.) Buck Doe also stated that "it bothered me." (Docket Item No. 64, Page 46, line 12; Page 51, lines 14-18; Page 52, line 9.)

R.A. Doe testified that it concerned him that his social security number was disclosed by the Department. (Docket Item No. 64, Page 75, line 8.) On cross-examination, however, R.A. Doe stated that it didn't really bother him that the Department had listed his social security number on his hearing notice. (Docket Item No. 64, Page 78, lines 9-10.)

Dallas Doe testified that he had worried so much over the Department's use of his social security number that he had sought medical treatment. (Docket Item No. 64, Page 69, line 25; Page 70, lines 1-12.) Dallas Doe did not, however, produce any medical evidence that he suffered from any medical or psychological condition necessitating treatment. Nor did he produce any medical evidence as to the cause of this alleged physical or mental condition.

Plaintiff, Buck Doe, also filed an affidavit for the court's consideration. (Affidavit of Buck Doe, Docket Item No. 14.) In this affidavit, Buck Doe stated that he was "greatly concerned and worried" about his name, social security number and address being disclosed by the Department. Buck Doe also stated, "I believe my privacy has been violated in a way that words cannot describe. . . . It has torn me all to pieces to realize that my social security number has been distributed. . . . I feel that . . . no amount of money could compensate me for worry and fear of not knowing when someone would use my name and social security number. . . ." (Docket Item No. 14.)

None of the other Plaintiffs or individuals who have sought to intervene have provided any evidence to the court, either by testimony or affidavits, with regard to what, if any

effect they claim the Department's disclosure has had on them.[5]

The Plaintiffs have filed the transcripts of the deposition and hearing testimony of several administrative law judges, ("ALJs"), who conducted black lung hearings. These ALJs testified that they had routinely used multi- captioned hearing notices which included the social security numbers of black lung claimants. (Deposition of Edward Terhue Miller, Page 46-7; Deposition of Richard K. Malamphy, Page 20.) None of these ALJs testified that he had been provided any training on the Privacy Act. (Deposition of Miller, Pages 13, 21; Deposition of Malamphy, Page 15.) Associate Chief ALJ Thomas Burke, testified at the court's April 1, 1998, hearing. Judge Burke stated that multi-captioned hearing notices were used to save personnel, administrative and supply resources. (Docket Item No. 67, Page 114.) Also, Chief ALJ of the Department of Labor, John Vittone, testified at this hearing that the black lung program was the Department's only benefits program which used social security numbers as identifiers. (Docket Item No. 67, Page 56.) Also, both Vittone and Burke testified that they had received no training with regard to the Privacy Act. (Docket Item No. 67, Pages 36-37, 148.)

III. Analysis

The first issue which should be addressed by the court is the issue of class certification. Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure. First, a party seeking certification has the burden of showing that he or she meets all four of the prerequisites to a class action, set forth in Rule 23(a):

---

[5] Examples of these published opinions can be found in the record. (Exhibits C1, C2, C3, C4, C5 and C6, Docket Item No. 31.)

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable [numerosity], (2) there are questions of law or fact common to the class [commonality], (3) the claims or defenses of the represented parties are typical of the claims or defenses of the class [typicality], and (4) the representative parties will fairly and adequately protect the interest of the class [adequacy].

FED. R. CIV. P. 23(a). *See* 7A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1759 (2nd Ed. 1986). Second, the party seeking certification must meet at least one of the three possible categories for maintaining a class action described in 23(b). *See* WRIGHT at § 1759. Rule 23(b) states:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby,

> making appropriate final injunctive relief or corresponding to declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

FED. R. CIV. P. 23(b). As stated above, the burden to plead and prove each of these requirements in this case rests with the Plaintiffs, who are seeking class certification. *See In re A.H. Robins Co., Inc.,* 880 F.2d 709, 728 (4th Cir. 1989); *see also, In re American Med. Sys., Inc.,* 75 F.3d 1069, 1086 (6th Cir. 1996); *Lyon v. United States,* 94 F.R.D. 69, 73 (W.D.Okla. 1982). Also, a district court has wide discretion in deciding whether or not to certify a proposed class. *See Robins,* 880 F.2d at 728-29; *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188, 1197 (6th Cir. 988).

Based on my application of these requirements to the facts of this case, and based, in part, on my recommendation with regard to the parties' cross motions for summary judgment contained below, I recommend that the court deny the Plaintiffs' motion to certify this case as a class action. Based on the allegations of the Plaintiffs,[6] I find that there is little question that the facts of this case would satisfy the requirements of numerosity, commonality and adequacy. I, however, cannot find that the claims of the Plaintiffs are typical of the claims of the class. Based on this finding, I do

---

[6] The substantive allegations of the Plaintiffs are accepted as true for the purpose of determining whether a case should be certified as a class action. *See Jackson v. Rapps,* 132 F.R.D. 226, 230 (W.D.Mo. 1990).

not address whether the facts of this case satisfy any of the three requirements contained in Rule 23(b).

In *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998), the Fourth Circuit found that the individualized nature of the damages claimed in an action could destroy the typicality needed to pursue a class action. In Privacy Act cases such as this one, certain specific determinations must be made on an individual basis. *See Lyon,* 94 F.R.D. at 76. In particular, as set forth in greater detail below, each plaintiff must plead and prove his "actual damages sustained." 5 U.S.C.A. § 522a(g)(4)(A) (West 1996). Here, the Plaintiffs are alleging only emotional injuries,[7] and the courts have been hesitant to find emotional injuries typical. *See Sanna v. Delta Airlines,* 132 F.R.D. 47, 50 (N.D.Ohio 1990) (plaintiffs alleged injuries from in-flight technical problems on an international flight); *Ikonen v. Hartz Mountain Corp.,* 122 F.R.D. 258, 262-63 (S.D.Cal. 1988) (pet owner sued over allegedly poisonous flea and tick spray); *Alvarado Morales v. Digital Equip. Corp.,* 669 F. Supp. 1173, 1185 (D.Puerto Rico 1987) (employees sued over workplace conditions); *In re Three Mile Island Litig.,* 87 F.R.D. 433, 441-42 (M.D.Pa. 1980) (denying class certification for claims alleging emotional distress from nuclear accident because each claim required "individual proof"). *But see Sterling,* 855 F.2d at 1197 (although unique and particular proof was needed from each plaintiff on the issue of damages, class certification was appropriate on issue of liability); *Medicare Beneficiaries'*

[7] As stated above, none of the Plaintiffs' complaints nor the Amended Complaint specifically allege that the Plaintiffs suffered any damages, emotional or otherwise, as a result of the Department's actions. Nonetheless, the Plaintiffs assert in their written legal arguments that they are alleging emotional injuries only. *(See, e.g.,* Docket Item No. 11 at 3.)

Defense Fund v. Empire Blue Cross Blue Shield. 938 F. Supp. 1131, 1147 (E.D.N.Y. 1996) ("individual questions with respect to damages will not defeat class certification or render a proposed representative inadequate unless that issue creates a conflict which goes to the heart of the lawsuit," even when the plaintiffs seek damages for emotional distress). The individualized nature of the proof required to prove the Plaintiffs' alleged emotional injuries precludes this court from finding that the Plaintiffs' claims are typical of those of the class. *See Lyon,* 94 F.R.D. at 76; *see also Windham v. American Brands, Inc.,* 565 F.2d 59, 72 (4th Cir. 1977) (en banc) (in antitrust case, class action should not have been certified where there exists no easy formula for computing damages without individual determination); *Ryan v. Eli Lilly and Co.,* 84 F.R.D. 230 (D.S.C. 1979). Therefore, I recommend that the court deny Plaintiffs' Motion To Certify Class Action. (Docket Item 23.)

Next, the court must address the parties' cross motions for summary judgment. Summary judgment is appropriate in a case "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). In considering a motion for summary judgment, the function of the district court is not to weigh the evidence, but to determine whether a genuine issue of fact exists for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). The party seeking summary judgment has the responsibility to inform the court of the basis for its motion and to identify the parts of the record which it believes demonstrate the absence of genuine issues of material fact.

See Celotex Corp., 477 U.S. at 323. In contrast, the non-moving party "need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." *Anderson,* 477 U.S. at 257. "The evidence of the non- movant is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Anderson,* 477 U.S. at 255. Thus, summary judgment should be granted only if, upon consideration of the record as a whole, a reasonable trier of fact could not find for the non-movant. *See Allstate Fin. Corp. v. Financorp, Inc.*, 934 F.2d 55, 58 (4th Cir.1991). Once the moving party has met its burden to show an absence of material fact, the opposing party must come forward with affidavits or other evidence demonstrating that there is a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 323-25; *Anderson,* 477 U.S. at 248-49. The party opposing summary judgment cannot rest on unverified pleadings and allegations, but, instead must present some type of evidentiary material in support of its position. *See Celotex Corp.*, 477 U.S. at 324. When ruling on cross motions for summary judgment, the court must consider the motions independently and view evidence in each motion in the light most favorable to the party opposing the motion.

In these cases, the parties have filed cross motions for summary judgment. As stated above, there is little, if any, dispute in the facts at issue in this case. The issues to be determined, therefore, are whether the undisputed facts prove that the Department violated the Privacy Act and whether the Plaintiffs are entitled to damages.

The Plaintiffs claim that they are entitled to summary judgment because the undisputed facts show that the Department violated the Privacy Act by disclosing their social security numbers, without their permission on numerous occasions. The Plaintiffs claim that these

disclosures had an adverse effect on each of them entitling each Plaintiff to the statutory minimum damages of $1,000 for each violation.

The Department, on the other hand, claims that the undisputed facts show that it is entitled to summary judgment as a matter of law. In particular, the Department argues that its use of the Plaintiffs' social security numbers did not violate the Privacy Act because the Plaintiffs consented to the disclosure knowing that black lung proceedings are public proceedings and that the use was disclosed by the Department as a "routine use." The Department also argues that summary judgment should be granted in its favor because the Plaintiffs have failed to produce any evidence that they have suffered any adverse effect or actual damages as a result of the use of their social security numbers. The Department also argues that the Plaintiffs are not entitled to damages under the Privacy Act because they cannot show that the Department's actions were intentional and willful.

The right of privacy is one of the most closely guarded treasures of our society. It is characterized as an individual's interest in avoiding disclosure of personal matters. "In response to growing concerns over the accumulation of massive amounts of personal information, Congress passed the Privacy Act of 1974." *Greidenger v. Davis,* 988 F.2d 1344, 1353 (4th Cir. 1993). The Privacy Act of 1974 was designed to safeguard the right of personal privacy against invasion by government agencies which collect and use personal data. It was intended to "provide protection against possible abuses of governmental power to affect an individual's privacy and confidential information. . . .' *Williams v. Department of Veterans Affairs,* 104 F.3d 670, 676 (4th Cir. 1997). Congress sought "to promote governmental respect for the privacy of citizens

by requiring all departments and agencies of the executive branch and their employees, to observe certain constitutional rules in computerization, collection, management, use, and disclosure of personal information about individuals." S. Rep. No. 93-1183 (1974) *reprinted in* 1974 U.S.C.C.A.N. 6916, 6916 (Senate Report accompanying S. 3418, The Privacy Act of 1974).

To address these concerns, Congress, through passage of the Privacy Act, made it unlawful for any agency to disclose any record contained in its system of records to any person or other agency, except pursuant to written request by, or with the prior written consent of, the individual to whom the record pertains. *See* 5 U.S.C.A. § 552a(b) (West 1996 & Supp. 1999). This section lists a number of exceptions to this rule, none of which the Department argues is applicable here, except for the "routine use" exception. *See* 5 U.S.C.A. § 552a(b)(3). The Privacy Act defines "routine use" of a record as "the use of such record for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C.A. § 552a(a)(7) (West 1996).

The Privacy Act also requires that an agency collecting information from an individual must inform the individual of the authority which authorizes it to solicit the information, whether disclosure of the information is mandatory or voluntary, the principal purposes for which the information is intended to be used, the routine uses to be made of the information and the effects on the individual, if any, of not providing the requested information. *See* 5 U.S.C.A. § 552a(e)(3)(A)-(D) (West 1996). The Privacy Act also requires each agency to keep an accurate accounting of the date, nature, purpose and the name and address of the person or agency to whom any disclosure is made, including disclosure for routine uses. *See* 5 U.S.C.A. § 552a(e)(1) (West 1996).

Congress also specifically recognized the dangers of widespread dissemination of social security numbers when it enacted the Privacy Act. A primary impetus for the legislation was to "curtail the expanding use of social security numbers by federal and local agencies and, by so doing, to eliminate the threat to individual privacy and confidentiality of information posed by common numerical identifiers." *Doyle v. Wilson*, 529 F. Supp. 1343, 1348 (D.Del. 1982) (citing S. Rep. No. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6944.) Consequently, the Privacy Act specifically addresses the use and disclosure of social security numbers. The Privacy Act established that it is unlawful for any federal, state or local government agency to deny any individual any right, benefit or privilege provided by law because the individual refused to disclose his or her social security number. *See* Pub. L. No. 93-579, § 7(a)(1), 88 Stat. 1895, 1909 (codified at 5 U.S.C.A. § 552a Historical And Statutory Notes (West 1996)).[8] The Privacy Act also requires that any government agency which requests an individual to disclose his social security number must state whether the disclosure is mandatory or voluntary, by what statutory authority the number is being solicited, and what uses will be made of the number. *See* Pub. L. No. 93-579, § 7(a)(1), 88 Stat. 1895, 1909 (codified at 5 U.S.C.A. § 552a Historical And Statutory Notes (West 1996)). Since the enactment of the Privacy Act, the concerns over social security numbers as widespread identifiers has increased exponentially. *See Greindiger*, 988 F.2d at 1353. In fact, the court in *Greindiger* cited numerous examples of the devastating impact that the disclosure of one's social security number can bring. *See Greindiger*, 988 F.2d at 1353-54 (citing newspaper articles).

---

[8] The Privacy Act contains several provisions that were not codified but may be found as Historical And Statutory Notes to 5 U.S .C. § 552a.

Nonetheless, to prevail on their claims for damages under the Privacy Act, Plaintiffs must establish the following four elements: (1) the information at issue is covered by the Privacy Act as a "record" contained in a "system of records;" (2) the agency "disclosed" the information; (3) the disclosure had an "adverse effect" on the Plaintiffs (an element which separates itself into two components: (a) an adverse effect standing requirement and (b) a causal nexus between the disclosure and the adverse effect); and (4) the disclosure was willful and intentional. *See Quinn v. Stone,* 978 F.2d 126, 131 (3d Cir. 1992); *see also Rose v. United States,* 905 F.2d 1257, 1259 (9th Cir. 1990). The Privacy Act states that an individual who proves the above elements may recover an amount equal to the sum of "actual damages sustained . . . but in no case shall a person entitled to recovery receive less than the sum of $1,000. . . ." 5 U.S.C.A. § 552a(g)(4)(A) (West 1996).

In this litigation, no dispute exists as to whether the social security numbers at issue constitute records as defined by the Privacy Act. A "record" may be "any item, collection, or grouping of information about an individual. . . ." 5 U.S.C.A. § 552a(a)(4) (West 1996). In fact, the Fourth Circuit has held that a "record" under the Act includes as little as one descriptive item about an individual. *See Williams,* 104 F.3d at 674. Thus, I recommend that the court find that the social security numbers at issue constitute records as defined by the Privacy Act.

Also, Plaintiffs point to the undisputed widespread mailing of the multicaptioned hearing notices to support their position that the Department "disclosed" their social security numbers. In opposition, the Department presents two arguments. First, the Department maintains that any social security numbers used were voluntarily provided to

the Department and that the claimants were on constructive notice that the black lung determination proceedings are public proceedings. *See* 30 U.S.C.A. § 932(a) (West 1986) (incorporating 33 U.S.C.A. § 923(b) (West 1986)). Thus, the Department argues the Plaintiffs have no right to now complain that their social security numbers have been disclosed. While I agree with the Department, that any claimant who supplied a social security number did so voluntarily, I do not find that by providing their social security numbers the Plaintiffs were on notice of, or consented to, their use on multi-captioned hearing notices or in published black lung opinions.

The Department correctly notes that the Claim Form on which the Plaintiffs provided their social security numbers clearly indicated that disclosure of the numbers was voluntary and informed the Plaintiffs that the failure to disclose their social security numbers would not result in the denial of any right, benefit or privilege to which a claimant may be entitled. (Exhibit 1 at 4, Docket Item No. 21.) The Claim Form does not, however, contain any notification that a claimant's social security number would be used on multi-captioned hearing notices or published in compilations of black lung opinions.

Plaintiffs here provided their social security numbers for the limited purpose described on the Claim Form—to determine eligibility for and the amount of benefits payable. They did not provide a general authorization to disclose any personal information listed on the form to a variety of sources unconnected to their claims or to the public at large. *See, e.g., Thomas v. Veterans Admin.,* 467 F. Supp. 458, 460 n.4 (D.Conn. 1979) (quoting an example of an arrest record waiver). Moreover, the Privacy Act clearly indicates that when an agency solicits a social security number it shall inform the individual of what use will be made of it. *See* 5

U.S.C.A. § 552a(e)(3)(B)-(C) (West 1996); *Doe v. Sharp,* 491 F. Supp. 346, 350 (D.Mass. 1980) (citing to S. Rep. No. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916). Furthermore, prior to 1999, the Department's own regulations required it to notify an individual of the uses that may be made of a social security number. *See* 29 C.F.R. § 70a.10(c)(1) (1998). The Department did not inform the Plaintiffs in these cases that their social security numbers would be used as identifiers and disseminated to numerous other individuals and companies on multi-captioned hearing notices. Nor did the Department inform the Plaintiffs that their social security numbers would be published in compilations of black lung opinions. I conclude that the manner in which the social security numbers were used in these cases is far afield from simply using them to determine eligibility for benefits. *See generally Doe v. General Services Admin.,* 544 F. Supp. 530 (D.Md. 1982) (release of military psychiatric records). Therefore, I reject any argument by the Department that the Plaintiffs voluntarily consented to use of their social security numbers for these purposes.

I also reject the Department's argument that the practice of disseminating social security numbers on multi-captioned hearing notices was permissible because black lung proceedings are public proceedings. "While the [Privacy] Act does not specifically define 'disclosure,' common sense requires that this term be taken to denote the imparting of information which in itself has meaning and which was previously unknown to the person to whom it was imparted." *Sullivan v. United States Postal Serv.,* 944 F. Supp. 191, 196 (W.D.N.Y. 1996) (quoting *Harper v. United States,* 423 F. Supp. 192, 197 (D.S.C. 1976)). The Department cites *Ash v. United States,* 608 F.2d 127 (5th Cir. 1979), to support its argument. In that case, the

plaintiff was punished by the Navy for drug use in a non-judicial proceeding. He contended that his privacy was infringed when his name, offense and punishment were published in the daily bulletin of his command. The court concluded that since the proceedings themselves were open to the personnel of the command, publication of the results to that same command was not a disclosure under the Privacy Act.

If the issue before this court were whether publishing the results of a claimant's application for black lung benefits was a disclosure under the Privacy Act, I might view *Ash* as instructive. However, the issue in dispute here is much more specific. The Plaintiffs are not alleging that the Department violated the Act by releasing the determination made on their claims or information used to determine their claims. The Plaintiffs allege that the Department has violated the Privacy Act by using their social security numbers as OWCP file numbers and then disclosing their social security numbers to others without their permission. The use and dissemination of a claimant's social security number has no relation to the public proceedings of determining black lung eligibility. The logic employed by the Fifth Circuit in *Ash* supports this conclusion. Before determining that no disclosure had occurred, the court detailed the history of the military proceedings that were open to the command. *See Ash,* 608 F.2d at 179. The court noted that historically these summary proceedings have been open to the command. *See* 608 F.2d at 179. In fact, they were traditionally held near the ship's mainmast before the entire crew before general announcements and awards were given. The disclosure of social security numbers knows no such openness. The Department has produced no evidence that disseminating social security numbers has anything at all to do with the openness of black lung

proceedings. In fact, the only true reason given for the use of claimants' social security numbers as file identifiers was for the convenience of the Department. (Docket Item No. 21 at 3, 5 and Exhibit 2.) To the contrary, as Congress clearly articulated in passing the Privacy Act, preventing the widespread disclosure of social security numbers was a primary goal of the Act.

Based on arguments by the Department's counsel at various hearings, it also appears that the Department argues that it should not be held liable for disclosing information which already may be public knowledge. (Docket Item No. 64, Pages 31-35, 48-51, 66-68, 78-80, 87-89.) Courts have interpreted the argument that information is not disclosed if it is already public in different ways, however, none of these various approaches, aids the Department's position. The Third Circuit in *Quinn* considered a contention that when information is readily accessible to members of the public (such as through a telephone book) that no disclosure has occurred. While such an argument would be misplaced here due to the confidential nature of social security numbers, I agree that such an approach would "eviscerate the Act's central prohibition [against] disclosure." *Quinn,* 978 F.2d at 134. Similarly, the Fifth Circuit has considered the argument that there is no disclosure within the terms of the Privacy Act where each individual member of the public should be presumed to know the information at issue. *See Federal Deposit Ins. Corp. v. Dye,* 642 F.2d 833, 836 (5th Cir. 1981) (advertisement of foreclosure sales). That approach provides no support to the Department's argument here since the general public is in no way expected to know the social security numbers of its fellow citizens. Thus, I reject the Department's argument that no disclosure occurred here because black lung hearings are public proceedings and because the Plaintiffs may have voluntarily

disclosed their social security numbers to others on other occasions.

I also reject the Department's argument that the use of Plaintiffs' social security numbers on multi-captioned hearing notices was a "routine use" permitted by the Privacy Act. As the Tenth Circuit recognized in *Parks v. IRS,* the Act establishes notice-and-comment rulemaking procedures for determining what constitutes a "routine use" of information from an agency's record system. 618 F.2d 677, 681 (10th Cir. 1980); *See* 5 U.S.C.A. § 522a(e)(4) (West 1996). In order for a use of agency information to qualify as a routine use exemption, each agency must publish annually in the Federal Register a notice including each routine use of the records contained in its system of records along with the categories of users and the purpose of such use. *See* 5 U.S.C.A. § 552a(e)(4) (West 1996); *Parks,* 618 F.2d at 681-82; *Local 2047 v. Defense Gen. Supply Ctr.,* 423 F. Supp. 481, 484 (E.D.Va. 1976) (government not required to give labor union access to private information when the material does not fall under the "routine use" exception to the privacy act).

The Department argues that the disclosure of Plaintiffs' social security numbers are exempt because the disclosure qualifies as a routine use pursuant to its notice published in the Federal Register in September 1993. *See* Privacy Act of 1924; Publication in Full of All Notices of Systems of Records Including Numerous New Systems; Publication of proposed Positive Uses, 58 Fed. Reg. 49,548 (1993) (noticed September 23, 1993). According to this notice, all information provided by black lung claimants, including social security numbers, was to be maintained in a separate system of records known as the Office of Workers' Compensation, Black Lung Benefits Claim File. *See* 58 Fed. Reg. at 49,597. The notice also lists 11 routine uses of

this information. *See* 58 Fed. Reg. at 49,597-98. Despite the Department's assertions to the contrary, this list does not contain any mention of the disclosure of claimants' social security numbers to uninterested parties on multi-captioned hearing notices or to the public at large in compilations of black lung opinions. *See* 58 Fed. Reg. at 49,597-98. Thus, I recommend that the court find that the Department has disclosed the Plaintiffs' social security numbers and that these disclosures were not exempt under the Act.

The Department also argues that summary judgment should be granted in its favor because the Plaintiffs have produced no evidence that the disclosure of their social security numbers has had any adverse effect on them. *See* 5 U.S.C.A. § 552a(g)(1)(D) (West 1996); *Parks,* 618 F.2d at 682. The Privacy Act's civil remedies section provides as follows:

> Civil Remedies.—Whenever any agency . . .
>
> (D) fails to comply with any provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,
>
> the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters....

5 U.S.C.A. § 552a(g)(1)(D) (West 1996). This section gives an individual adversely affected by any agency violation of the Privacy Act a judicial remedy whereby the individual may seek damages. Two limitations are placed on this right to sue. First, the adverse effect requirement is essentially a standing requirement—only those individuals who have been adversely affected may bring suit under the Act. Second, plaintiffs also must allege a causal connection between the agency violation and the adverse effect. *See*

Hewitt v. Grabicki, 794 F.2d 1373, 1379 (9th Cir. 1986) (applicability of Privacy Act cause of action to contents of employees' proficiency reports); *Albright v. United States,* 732 F.2d 181, 186 (D.C.Cir. 1984) (applicability of Privacy Act cause of action to action against Social Security Administration for videotaping a private meeting).

The Plaintiffs argue that they have met the adverse effect requirement by alleging in their complaints that the disclosure of their social security numbers caused them embarrassment and emotional trauma. The Department, on the other hand, argues that the Plaintiffs must show more than emotional injury to show an adverse effect. Based on my review of the cases, I believe that evidence that the disclosure had caused emotional distress would be sufficient to meet this requirement and confer standing. *See Parks,* 618 F.2d at 683; *Albright,* 732 F.2d at 186. As stated above, however, none of the complaints or the Amended Complaint, make any allegations that the Plaintiffs suffered any embarrassment or emotional distress as a result of the disclosure. The complaints and the Amended Complaint allege only that the Plaintiffs have suffered an "adverse effect" as a result of the disclosure, with no allegation made and no subsequent evidence provided as to what type of adverse effect each claims to have suffered.

Nonetheless, I believe the undisputed facts show that the Plaintiffs have suffered an adverse effect in that their social security numbers have been widely distributed without their consent. As stated above, the adverse effect requirement is essentially a standing requirement. *Parks,* 618 F.2d at 682-83. Although the Privacy Act is silent on what constitutes an adverse effect, the phrase "adverse effect" derives from the remedial section of the House bill, H.R. 16373, 93d Cong. (1974), which states that:

> [A]n action will lie for the failure of the agency to comply with any other section of this law when such non-compliance has an adverse effect upon the aggrieved individual.

Parks, 618 F.2d at 682 (citing H. Rep. No. 93-1416, at 17 (1974)). Based on this, it is clear that Congress intended that only an individual whose privacy had been violated should be able to pursue a claim for damages. I do not believe, however, that the adverse effect that a plaintiff must show to have standing is equivalent to the proof of "actual damages" required to recover under 5 U.S.C.A. § 552a(g)(4)(A). *See Quinn,* 978 F.2d at 135 n.15 (citing *Dickson v. Office of Personnel Management,* 828 F.2d 32, 37 (D.C.Cir. 1987) (interpreting a similar term "a determination is made which is adverse to the individual" in 5 U.S.C. § 552a(g)(1)(C))). Here, the Plaintiffs' personal, private information was illegally disclosed. In my opinion, this, in and of itself, is sufficient to meet the adverse effect requirement. *See Parks,* 618 F.2d at 683. Therefore, I recommend that the court find that the Plaintiffs have suffered an adverse effect by the Department's disclosure of their social security numbers.

To prevail in an action brought pursuant to the Privacy Act, a plaintiff also must prove that "the agency acted in a manner which was intentional or willful." 5 U.S.C.A. § 552a(g)(4) (West 1996). "The legislative history describes this standard as (somewhat greater than gross negligence)." *Dowd v. Internal Revenue Serv.,* 776 F.2d 1083, 1084 (2d Cir. 1985); *see also Romero-Vargas v. Shalala,* 907 F. Supp. 1128, 1133 (N.D.Ohio 1995) (both quoting 120 Cong. Rec. 40,405 (1974)(Analysis of House and Senate Comprise Amendments to the Federal Privacy Act)). However, the legislative history also indicates that a plaintiff is not required to prove the agency acted willfully,

arbitrarily or capriciously, as such a standard of proof is too harsh. *See Parks,* 618 F.2d at 683 (also citing 120 Cong. Rec. 40,405 (1974)). Along the same lines, premeditated malice also is not required. *See Parks,* 618 F.2d at 683; *Andrews v. Veterans Admin.,* 838 F.2d 418, 424 (10th Cir. 1988) (personnel records); *Doe,* 544 F. Supp. at 541.

Precisely defining "intentional and willful" under the Privacy Act has been an issue of constant dispute among the circuits. Many courts, including the Fourth Circuit, have concluded that something more than gross negligence is required. *See Scrimgeour v. IRS,* 149 F.3d 318, 326 (4th Cir. 1998); *Tijerna v. Walters,* 821 F.2d 789, 799 (D.C.Cir. 1987); *Moskiewicz v. Dept. Of Agriculture,* 791 F.2d 561, 564 (7th Cir. 1986); *Dowd,* 776 F.2d at 1084. According to this approach, "willful and intentional" contemplates an action that is so "patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful" or conduct committed "without grounds for believing it to be lawful" or action "flagrantly disregarding others' rights under the Act." *Andrews,* 838 F.2d at 425; *see also Scrimgeour,* 149 F.3d at 326; *Waters v. Thornburgh,* 888 F.2d 870, 875 (D.C.Cir. 1989). Other courts, however, have suggested that establishing that the agency acted with gross negligence is sufficient. *See, e.g., Chapman v. National Aeronautics and Space Admin.,* 736 F.2d 238, 243 (5th Cir. 1984); *Albright,* 732 F.2d at 189 & n.25. Also, at least one circuit has stated that an agency's failure to comply with its own established policy might constitute willful and intentional conduct. *See White v. Office of Personnel Management,* 840 F.2d 85, 87 (D.C.Cir. 1988); *see also Romero-Vargas,* 907 F. Supp. at 1133-34.

Resolution of the issue at bar does not require this court to further grapple with the intricacies of the definition. Rather, I find that the Department's conduct in the case

exceeded gross negligence. The Department's indiscriminate release of social security numbers illustrated, in my view, a flagrant disregard for the rights of black lung claimants. *See Waters,* 888 F.2d at 875. Even the most cursory reading of the Privacy Act suggests that Congress was motivated in passing the Act by the devastating effects that disclosure of one's social security number can bring. *See* Pub. L. No. 93-579, § 7(a)(1), 88 Stat. 1895, 1909 (codified at 5 U.S.C.A. § 552a Historical And Statutory Notes (West 1996)). The Department's decision to disseminate a claimant's social security number went beyond release to many other black lung claimants, their attorneys, coal companies and insurance companies. As the Department was well aware, the social security numbers also were subsequently reported in published compilations of black lung opinions. The undisputed evidence shows that the Department took little, if any, action to see that it complied with the Privacy Act. *See Romero-Vargas,* 907 F. Supp. at 1134 (no effort to protect privacy rights constitutes willful and intentional violation of the Act). Several of the Administrative Law Judges responsible for sending out the multi-captioned hearing notices testified that they had received no training on the Privacy Act. (Deposition of Edward Terhune Miller, Pages 13, 21; Deposition of Richard K. Malamphy, Page 15; Testimony of Chief ALJ Vittone, Docket Item No. 67, Page 37; Testimony of Associate Chief Judge Burke, Docket Item No. 67, Page 148.) In fact, there appears to have been no Department requirement for such training until regulations were promulgated in 1999 requiring periodic training for all Department employees with Privacy Act responsibilities. *See* 29 C.F.R. § 71.15 (1999). Furthermore, the Department's argument that it had routinely disclosed claimants' social security numbers for more than 20 years without any previous complaints does not provide proof that

its actions were not intentional and willful, and it does not create any genuine issue of fact on this issue. Therefore, I recommend that the court find that the Department's actions were intentional and willful.

The Department also contends that it is entitled to summary judgment because none of the Plaintiff's have produced any evidence showing that they suffered any "actual damages" as a result of the disclosure of their social security numbers. In particular, the Department argues that none of the Plaintiffs have produced any evidence of any out-of-pocket expenses, such as medical bills or financial losses. The Plaintiffs argue that they have shown damages by showing that they have suffered emotional distress as a result of the disclosure, and, therefore, they should be entitled to receive at least the statutory damages provided for in the Act.

Section 552a(g)(4) of the Privacy Act states:

> In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—
>
> (A) *actual damages sustained* by the individual as a result of the refusal or failure, but in no case shall *a person entitled to recovery* receive less than the sum of $1,000....

5 U.S.C.A. § 552a(g)(4) (West 1996) (Emphasis added).

The courts which have considered this issue have adopted opposing views. Furthermore, these cases are complicated by the fact that many courts appear to confuse the adverse effect standing requirement with the actual damages

requirement. *See, e.g., Albright,* 732 F.2d at 186; *Romero-Vargas,* 907 F. Supp. at 1134-35. Some courts have taken the approach that a plaintiff must show actual pecuniary loss in order to bring a claim under the Privacy Act. *See Hudson v. Reno,* 130 F.3d 1193, 1207 (6th Cir. 1997) (actual damages under the Act do not include recovery for "mental injuries, loss of reputation, embarrassment or other non-quantifiable injuries"); *Fitzpatrick v. IRS,* 665 F.2d 327, 331 (11th Cir. 1982); *see also DiMura v. Federal Bureau of Investigation,* 823 F. Supp. 45, 47-48 (D.Mass. 1993) (Act permits recovery for only pecuniary loss); *Pope v. Bond,* 641 F. Supp. 489, 501 (D.D.C. 1986) (actual damages under the Act do not include damages for emotional trauma, anger, fright or fear).

Other courts have held that a plaintiff may recover statutory damages upon a showing of emotional distress. *See Wilborn v. Dept. of Health & Human Services,* 49 F.3d 597, 603 (9th Cir. 1995); *Albright,* 732 F.2d at 186 (emotional injuries may qualify as actual damages under the Act if causation can be proven); *Johnson v. IRS,* 700 F.2d 971, 986 (actual damages under the Act allows compensation for proven mental and physical injuries); *Parks,* 618 F.2d at 682-83; *Romero-Vargas,* 907 F. Supp. at 1134; *Andrews v. Veterans Admin.,* 613 F. Supp. 1404, 1415-16 (D.Wyo. 1985), *reversed on other grounds* 838 F.2d 418 (10th Cir. 1988) (as noted above, Administration not liable for Privacy Act violation, unless the plaintiff shows that the violation meets the standard for "willful or intentional" conduct). *See also Rorex v. Traynor,* 771 F.2d 383, 387 (8th Cir. 1985), and *Hrubec v. Nat'l R.R. Passenger Corp.,* 829 F. Supp. 1502, 1506 (N.D.Ill. 1993) (actual damages for knowing and negligent disclosure of federal tax return information includes compensation for emotional distress).

After reviewing these cases, I am persuaded that a plaintiff should be able to recover the statutory damages provided for in the Act upon a showing that he has suffered emotional distress. As recognized by the District Court in *Romero-Vargas,* I believe this interpretation comports with the Supreme Court's general holding that the primary damage in privacy cases is mental distress, *see Romero-Vargas,* 907 F. Supp. at 1134 (citing *Time, Inc. v. Hill,* 385 U.S. 374 (1967)), and with the legislative history and purpose of the statute. *See* S. Rep. No. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916. Furthermore, mental or emotional distress is the normal and typical damage resulting from an invasion of privacy. *See Johnson,* 700 F.2d at 977. As the Fifth Circuit stated in *Johnson:*

> A federal act affording special protection to the right of privacy can hardly accomplish its purpose of protecting a personal and fundamental constitutional right if the primary damage resulting from an invasion of privacy is not recoverable under the major remedy of 'actual damages' that has been provided by Congress.

Johnson, 700 F.2d at 977.

A plaintiff, however, should be allowed to recover only for those actual damages which he can prove. *See Johnson,* 700 F.2d at 980; *but see Wilborn,* 49 F.3d at 603 (summary judgment for plaintiff acceptable when plaintiff only seeks statutory minimum of $1,000). Therefore, each of the Plaintiffs' claims in these cases, with the exception of the claims of Buck Doe, must fall to summary judgment on this issue, because none has provided any proof of damages. As stated above, none of the Plaintiffs, other than Buck Doe, have filed any affidavits asserting that they have suffered any damages, emotional or otherwise. Only two of the named Plaintiffs, Robert Doe and Buck Doe, and two of the

individuals who have moved to intervene, R.A. Doe and Dallas Doe, have offered any testimony for the court's consideration, and this testimony, with the exception of Dallas Doe's testimony, does not contain any evidence that they suffered any financial loss, out-of-pocket expense or emotional distress as a result of the Department's disclosure of their social security numbers.

On the other hand, Buck Doe has proffered evidence by way of affidavit. (Docket Item No. 14), which states that he suffered emotional distress as a result of his social security number being disclosed by the Department. Therefore, I find that Buck Doe has produced evidence of damages and causation sufficient to withstand the Department's motion for summary judgment.[9] *See Johnson,* 700 F.2d at 980.

In reaching this conclusion, I am mindful of Congress' purposes in enacting the Act. Specifically, I am mindful that Congress intended the Act to be a self-help enforcement program, which would encourage the filing of lawsuits to protect an individual against unnecessary invasions of

---

[9] Dallas Doe, likewise, has testified that the Department's disclosure of his social security number has caused him emotional distress. Dallas Doe is the only individual who has moved to intervene in this case who has produced any evidence of damages. Since the court has not yet granted Dallas Doe's motion to intervene, I do not address the issue of whether his testimony alone would be sufficient proof to present an issue of fact with regard to the cause of his alleged mental or physical condition and subsequent medical treatment. *See Houlihan v. Office of Personnel Management,* 909 F.2d 383, 384-85 (9th Cir. 1990); *see also McKenna v. Pacific Rail Service,* 32 F.3d 820, 833-34 (3d Cir. 1994). I do believe, however, that Buck Doe's testimony is sufficient proof to raise an issue of fact as to the causation of his emotional distress, because he is not alleging distress of a severity which required medical treatment. *See Quinn,* 978 F.2d at 135-36; *Johnson,* 700 F.2d at 973-74; *see also Shuman v. Standard Oil Co. of California,* 453 F. Supp. 1150, 1154 (N.D.Cal. 1978).

privacy. *See Parks,* 618 F.2d at 685. Nonetheless, I cannot ignore the language of the remedies provisions of the Act. *See Hudson,* 130 F.3d at 1199. As stated above, § 552a(g)(4)(A) of the Act states that an agency which has violated the Act shall be liable to an individual in an amount equal to "actual damages sustained." I interpret this as requiring a plaintiff to both plead and prove damages before being entitled to any recovery, including the statutory damages provided. *See Molerio v. F.B.I.,* 749 F.2d 815, 826 (D.C.Cir. 1984).

Plaintiffs further allege that the Department has violated their constitutional right to privacy by disclosing their social security numbers. While Plaintiffs' counsel candidly acknowledges the lack of precedential case law on this point, he cites to the *Greidinger* case for support. In *Greidenger,* the Fourth Circuit opined that disclosure of social security numbers constitutes a "clearly unwarranted invasion of privacy." 988 F.2d at 1354. The Fourth Circuit did not, however, state in *Greidinger* that disclosure of an individual's social security number violated a constitutional right of privacy. I concur with the view held by other courts which have considered this issue and have held that disclosure of an individual's social security number does not so threaten the sanctity of individual privacy as to require constitutional protection. *See McElrath v. Califano,* 615 F.2d 434, 441 (7th Cir. 1980); *Doyle v. Wilson,* 529 F. Supp. 1343, 1348 (D.Del. 1982); *Greater Cleveland Wel. Rights Org. v. Bauer,* 462 F. Supp. 1313, 1318-19 (N.D.Ohio 1978); *Cantor v. Supreme Court of Pennsylvania,* 353 F. Supp. 1307, 1321-22 (E.D.Pa. 1973); *Conant v. Hill,* 326 F. Supp. 25, 26 (E.D.Va. 1971). *See also Ferguson v. City of Charleston,* 186 F.3d 469, 481-83 (4th Cir. 1999).

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Based on the personal nature of their claims, the Plaintiffs' claims are not typical of those of all class members as required by Federal Rule of Civil Procedure 23(a);

2. The Plaintiffs' motion to certify this case as a class action should be denied;

3. The social security numbers at issue in this case constitute records as defined by the Privacy Act;

4. By voluntarily providing their social security numbers on the black lung Claim Form, the Plaintiffs did not consent to the use of these numbers on multi-captioned hearing notices or the publishing of these numbers in black lung opinions;

5. The Department's use of Plaintiffs' social security numbers on multi- captioned hearing notices and in black lung opinions does not qualify as a "routine use" permitted by the Privacy Act;

6. The Department's use of the Plaintiffs' social security numbers on multi- captioned hearing notices or in black lung opinions qualifies as a disclosure under the Privacy Act;

7. The Department's disclosure of the Plaintiffs' social security numbers are not exempt under the Privacy Act because black lung hearings are public proceedings;

8. The Plaintiffs have suffered an adverse effect by the Department's disclosures of their social security numbers;

9. The Department's disclosure of Plaintiffs' social security numbers was intentional and willful under the Privacy Act;

10. The Department's disclosure of Plaintiffs' social security numbers violated the Privacy Act;

11. The Privacy Act allows recovery for emotional injury unaccompanied by pecuniary loss;

12. None of the Plaintiffs in this case, with the exception of Buck Doe, produced any evidence that they suffered any emotional distress as a result of the Department's disclosure of their social security numbers;

13. Buck Doe has produced evidence which creates a genuine issue of material fact as to whether he suffered any damages as a result of the Department's disclosure of his social security number;

14. The Department's disclosure of the Plaintiffs' social security numbers did not violate the Plaintiffs' constitutional right of privacy; and

15. Therefore, the court should issue summary judgment in favor of the Department on all of the Plaintiffs' claims, except for Buck Doe's claim.

RECOMMENDED DISPOSITION

Based on the above stated reasons, I recommend that the court deny the Plaintiffs' Motion To Certify Class Action, (Docket Item 23), and motion for summary judgment, (Docket Item No. 11), and grant the Department's motion for summary judgment, (Docket Item No. 21), as to each

named Plaintiff except Buck Doe. I recommend that the court find that Buck Doe has presented evidence of his alleged damages and causation sufficient to survive the Department's motion for summary judgment.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S . C.A. § 636(b)(1)(C) (1993):

> Within ten days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendation to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]. The judge may also receive further evidence to recommit the matter to the magistrate [judge] with instructions.

Failure to file written objection to these proposed findings and recommendations within 10 days could waive appellate review. At the conclusion of the 10-day period the Clerk is directed to transmit the record in this matter to the Honorable Glen M. Williams, Senior United States District Judge.

The clerk is directed to send copies of this Report and Recommendation to all counsel of record at this time.

5 U.S.C. § 552a

UNITED STATES CODE
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
CHAPTER 5--ADMINISTRATIVE PROCEDURE

§ 552a. Records maintained on individuals

(g)(1) Civil remedies.--Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was

intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.